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Superior

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1947

No. 73

MARIANNA VON MOLTKE, PETITIONER,

vs.

A. BLAKE GILLIES, SUPERINTENDENT OF THE
DETROIT HOUSE OF CORRECTION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 24, 1947.

CERTIORARI GRANTED JUNE 2, 1947.

IN THE
United States Circuit Court of Appeals
FOR THE SIXTH CIRCUIT

(No.)

MARIANNA von MOLTKE,
Appellant,

vs.

A. BLAKE GILLIS,
Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION

TRANSCRIPT OF RECORD

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Attorney for Petitioner and
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2463 Penobscot Building,
Detroit 26, Michigan.

JOHN C. LEHR,
United States District Attorney,

VINCENT FORDELL,
Assistant United States Attorney,
Attorneys for Appellee.

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IN THE
United States Circuit Court of Appeals

FOR THE SIXTH CIRCUIT

(No.)

MARIANNA von MOLTKE,
Appellant,

vs.

A. BLAKE GILLIS,
Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION

TRANSCRIPT OF RECORD

PETITION FOR WRIT OF HABEAS CORPUS

(Filed February 7, 1946)

To the Honorable Judges of the District Court for the
Eastern District of Michigan, Southern Division:

Your petitioner, Grafyn Marianna von Moltke, respectfully shows:

1. That she is a resident of the City of Detroit, Wayne County, Michigan; that she has resided in Detroit since

August, 1930 and has resided in the United States since December 29, 1926, on which date she arrived in the United States with her husband, Heinrich von Moltke, who became a naturalized citizen of the United States in June, 1937, at Detroit, Michigan; that petitioner's application for naturalization is pending and has not as yet been acted upon; that petitioner is the mother of four children, one of whom, Henning von Moltke, is an invalid suffering from diabetes.

2. Petitioner is unjustly and unlawfully detained and imprisoned by color of the authority of the United States in the custody of A. Blake Gillies, Superintendent of the Detroit House of Correction at Plymouth, Michigan.

3. The cause or pretext of such detention and imprisonment is a certain order of commitment issued by this Court on a charge based upon Sec. 32, Title 50, USC, in Criminal Case No. 27301 dated November 15, 1944, ordering that petitioner be imprisoned and detained for a period of four years, copy of which order of commitment with the return thereto is attached hereto and marked Exhibit A.

4. Said restraint and imprisonment are illegal and in violation of the Constitution of the United States, particularly Amendments V and VI thereof, in that petitioner was neither aware nor properly advised of her right to have the assistance of counsel for her defense and did not understandingly waive the same, nor was petitioner properly and effectively provided with or afforded the assistance of counsel for her defense in accordance with the intent and purpose of the Vith Amendment to the Constitution of the United States in that regard; that contrary to the guarantee in the Vth Amendment to the Constitution of the United States, petitioner was deprived of her liberty without due process of law in that she was coerced, intimidated and deceived into making a plea of guilty notwithstanding her belief in the fact that she was innocent of the charges made against her; all of which is more particularly hereinafter set forth.

5. For many years prior to August 24, 1943, petitioner was a housewife and took care of her home where she lived with her husband and two of her four children; that petitioner has only a limited knowledge and understanding of the English language, having spoken the German language from birth; that petitioner has always spoken German in her home and has difficulty in expressing herself in English and in comprehending the same clearly; that petitioner is wholly unfamiliar with court proceedings and legal phraseology, having had no experience therewith prior to the date last mentioned; that petitioner's husband is a man of modest means, earning a small income, and that petitioner had no means or property of her own; that on August 24, 1943, at about 7 A. M., petitioner was arrested at her home by agents of the Federal Bureau of Investigation (hereinafter for brevity referred to as FBI) on a Presidential Warrant as a dangerous enemy alien and taken to the Federal Building, Detroit, Michigan, where she was finger printed, photographed, examined by a doctor and interrogated for approximately 12 hours by agents of the FBI, after which she was taken to the immigration detention home where she was held incommunicado despite her requests to see her husband so that she could arrange for the care and treatment of her youngest son, who is an invalid; that thereafter for several days petitioner was interrogated daily and held incommunicado; that she was not advised or informed of any charge having been made against her and was told by agents of the FBI that as an enemy alien she was not entitled to be represented by counsel; that on or about August 28, 1943, pursuant to petitioner's entreaties, an FBI agent called petitioner's husband on the telephone in her presence and relayed instructions to him as to the care and treatment of petitioner's invalid son, and that on the following day petitioner was permitted to talk to her husband for about fifteen minutes in the presence of an immigration inspector at the detention home; that on September 1, 1943 petitioner was taken before an enemy alien hearing board in said Federal Building where she was further

interrogated and advised that she was not permitted to have counsel to represent her; that on September 18, 1943, petitioner was handed a legal document by one of the detention home matrons, which document was later identified by an agent of the FBI as an indictment, but that petitioner was unable to comprehend the phrasology or import thereof and assumed that it was a step in the proceedings beginning with her arrest, and that she was not entitled to the benefit of counsel to assist and advise her in connection therewith; that on September 21, 1943, petitioner and another woman prisoner were taken before a Federal Judge in said Federal Building and told that he would appoint counsel for them if they were unable to employ one; that after petitioner and the other woman prisoner had stated their financial inability to retain counsel, they were taken to a room called the "bullpen," where they were interrogated by an assistant district attorney and later taken back before said Federal Judge, who thereupon designated an attorney present in the courtroom to represent petitioner and said other woman prisoner; that said attorney, so designated, stated to the Court that he preferred not to act as he was busy with a court case of his own, but as an accommodation to the court he would act, provided he would only be required to appear in connection with the arraignment of petitioner and said other woman prisoner; that thereafter said attorney held a hurried whispered conversation with petitioner in the courtroom, and asked petitioner how she wished to plead to the indictment; that petitioner replied that she was not guilty of anything and that, therefore, she wished to plead not guilty; that said attorney advised petitioner against pleading not guilty, giving a rapid, whispered legal explanation for his advice, which petitioner was unable to understand, and told petitioner to stand mute, the meaning of which was very vague to petitioner; that thereupon as petitioner is informed, she stood mute and a plea of not guilty was entered for her by the Judge, who then advised petitioner that he would send another attorney to her to represent her at her trial; that petitioner was thereupon taken to the Wayne

County jail, being unable to furnish bond of \$25,000; that thereafter petitioner remained in said jail from September 21, 1943 until November 18, 1944; that after September 21, 1943 petitioner was visited almost daily by agents of the FBI who interrogated petitioner and another woman prisoner; that said agents subjected petitioner to a subtle and continuous course of coercion, intimidation and deception calculated to put petitioner in a state of confusion and fear, overcome her will, destroy her belief in her own innocence and to cause petitioner to plead guilty to the charge in said indictment; that to accomplish these results, said FBI agents informed petitioner that the public was greatly aroused against persons accused of subversive activities, but that petitioner need have no fear, as the FBI would protect her; that the government had an iron-clad case against petitioner and that public feeling was running so high no jury would fail to convict her; that everyone else involved was pleading guilty and that it was useless to hold out against overwhelming odds; that if petitioner "cooperated" she would probably avoid a heavy sentence and might be put on probation; that petitioner did not have the benefit of counsel to advise her concerning the statements and representations made by said agents and that the attorney supposed to have been appointed for her by the Federal Judge never appeared; that one of said FBI agents informed petitioner he was an attorney from Texas and thoroughly familiar with the law in petitioner's case and advised petitioner that a person would be guilty of conspiracy by merely being present in the same room, with people discussing a plan, even though such person did not know such people, did not participate in the discussion and was not even aware that the plan was carried out; that between September 29, 1943 and October 7, 1943, petitioner was told by a fellow woman prisoner that unless she (petitioner) pleaded guilty, the FBI agents would take (arrest) petitioner's husband, whereupon petitioner became greatly disturbed and asked one of said FBI agents whether the information she had received was true; that said agent looked very stern and stated that

he could not answer petitioner's question but that if she "cooperated", she need never have any fear about her invalid son being well taken care of; that on October 7, 1943, without having received the assistance and advice of counsel and as a result of the foregoing, petitioner, accompanied by an assistant district attorney on her right, an agent of the FBI on her left and several other FBI agents standing to the rear of her, stood before another Federal Judge of this Court and pleaded guilty to the charge in the indictment, and signed, as petitioner is informed, a paper purporting to waive her right to be represented by counsel and to a jury trial; that thereafter petitioner became convinced that she had been betrayed and coerced into pleading guilty and that had she been provided with the assistance of counsel, she would not have so pleaded; that petitioner advised an agent of the FBI that she desired to withdraw her plea of guilty and have a trial and that said agent strongly advised her against doing so; that several days later petitioner was advised by an FBI agent that after sentence she could explain everything to the Judge, and submit a written statement to the probation officers and the newspapers thereby justifying her action in pleading guilty and further informed petitioner that the FBI office would typewrite her statements for her if she would write them out; that on January 15, 1944, an attorney sent to petitioner by her husband advised her concerning her rights including the presumption of innocence, that it was not necessary for her to prove her innocence, that there was no appeal from a sentence imposed upon a plea of guilty, and that petitioner had a legal right to withdraw her plea of guilty and have a jury trial; that thereafter petitioner made continuous attempts to change her plea and several times interviewed the United States District Attorney of this Court to that end; that on June 30, 1944, petitioner appeared before the Federal Judge before whom she had been arraigned and was advised by him that she had a legal right to change her plea but that it would be necessary for an attorney to prepare a written petition therefor and that he would appoint an attorney for that purpose; that thereafter such a petition was prepared and filed and that on November

15, 1944, after several delays and a written request by petitioner for a hearing thereon addressed to said Judge, a hearing was held on said petition at which time said Judge denied the petition and without interrogating petitioner or allowing her to testify, sentenced petitioner to imprisonment for a period of four years.

WHEREFORE your petitioner prays that a writ of habeas corpus be issued by this Court, directed to the said A. Blake Gillies, Superintendent of the Detroit House of Correction at Plymouth, Michigan, or any deputy superintendent, commanding him to produce the body of petitioner before this Court at a time and place therein to be specified, then and there to receive and do what this Court shall order concerning the detention and restraint of your petitioner or that said A. Blake Gillies or any deputy superintendent may be required to show cause why a writ of habeas corpus should not issue herein as prayed for and that your petitioner be ordered discharged from the detention and imprisonment aforesaid.

(S) Grafyn Marianna von Moltke
Petitioner.

(S) G. Leslie Field

(S) William O'Neill Kronner.

G. Leslie Field,
2463 Penobscot Building,
Detroit 26, Michigan.

William O'Neill Kronner,
2480 Penobscot Building,
Detroit 26, Michigan,
Attorneys for Petitioner.

County of Wayne—ss.

GRAFYN MARIANNA von MOLTKE being duly sworn, deposes and says that she is the petitioner named in the foregoing petition subscribed by her; that she has read

the same and knows the contents thereof, and the said statements are true as she verily believes.

(S) Grafin Marianna von Moltke

Subscribed and sworn to before me
Feb. 4, 1946.

(S) Mona L. Burrows,
Notary Public, Wayne County, Mich.
My commission expires 12-22-47.

(Notarial Seal.)

EXHIBIT A

Judgment and Commitment

DISTRICT COURT OF THE UNITED STATES

(Seal)

United States

v.

Grafin Marianna von Moltke

No. 27301

Criminal in one counts for violation of U.S.C., Title
50, Sec. 34.

(Filed Nov. 27, 1944)

On this 15th day of November, 1944, came the United States Attorney, and the defendant Grafin Marianna von Moltke, appearing in proper person, and being represented by counsel, Harry Okrent.

The defendant having been convicted on her plea of guilty of the offense charged in the above-entitled cause, to wit: Conspiracy to violate Espionage Act (Sec. 32,

Title 50 U.S.C.) and the defendant having been now asked whether she has anything to say why judgment should not be pronounced against her, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of four (4) years from this day, in a Federal Institution to be designated by the Attorney General, or his authorized representatives.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshall or other qualified officer and that the same shall serve as the commitment herein.
Approved as to form.

John C. Lehr, District Attorney.

(Signed) Edward J. Moinet,
United States District Judge.

The Court recommends commitment to Alderson, West Virginia.

(A True Copy.)

Certified this 15th day of November, 1944.

(Signed). George M. Read,
Clerk.

(By) May J. Dealy,
Deputy Clerk.

Return

I have executed the within Judgment and Commitment as follows:

Defendant delivered on Nov. 15, 1944, awaiting transfer to institution designated.

Defendant delivered on Nov. 18th to the Superintendent at House of Correction, Plymouth, Mich., the institution designated by the Attorney General, together with certified copy of the within Judgment and Commitment.

John J. Bare,
U. S. Marshal.

By Francis C. Woodruff,
Deputy.

AFFIDAVIT IN SUPPORT OF WRIT OF HABEAS CORPUS

(Filed Feb. 21, 1946)

STATE OF MICHIGAN,
COUNTY OF WAYNE—SS.

ARCHIE KATCHER, being first duly sworn, deposes and says:

That presently he is engaged in the practice of law with offices at 2366 Penobscot Building, City of Detroit, Wayne County, State of Michigan; that from the time of his admission to practice in 1940, and including September 21, 1943 and until November, 1943, he was continuously employed as a Clerk for the Referee in Bankruptcy in the District Court of the United States for the Eastern District of Michigan Southern Division;

That your deponent is the Archie Katcher whose name is signed to the Appearance entered in the above cause as attorney for Grafyn Marianna VonMoltke and Emma Elise Leonhardt for their arraignment only, and that this affidavit is made in connection with the circumstances leading up to and surrounding such appointment at their arraignment before the Honorable Edward J. Moinet, United States District Judge, on September 21, 1943;

That on September 21, 1943, your Deponent was engaged in the trial of a criminal case before the Honor-

able Edward J. Moinet, United States District Judge, when the Court interrupted the proceedings, and requested Deponent to represent Grafyn Marianna Von-Moltke and Emma Elsie Leonhardt, co-defendants in a conspiracy case who had just been brought into the courtroom; that Deponent advised the Court that he preferred not to represent said co-defendants for certain reasons disclosed to the Court; that the Court informed Deponent that he would only be required to appear for said co-defendants on their arraignment, and that the whole matter would take only a few minutes; that being so advised Deponent agreed to represent said co-defendants at their arraignment only;

That your Deponent then went over to where the two women were seated in the courtroom and informed them of his appointment as counsel for their arraignment; that your Deponent then asked them collectively, but not individually, whether they knew what the proceedings were about, and that one of the women (whose identity Deponent cannot exactly recall at this time) replied that she understood, and the other nodded in the affirmative; Deponent then asked them collectively whether they were guilty or innocent of the charges made against them, and that both said co-defendants indicated to Deponent that they were not guilty, and stated they wished to plead not guilty; Deponent then attempted to point out to said co-defendants the advantages of standing mute, and thereupon Deponent accompanied said co-defendants before the Court and informed the Court that they stood mute; that a plea of not guilty was thereupon entered for them by the Court. Later on the same day, Deponent entered his formal appearance for both co-defendants, and that the foregoing represents the full extent of Deponent's representation and assistance as counsel for said co-defendants;

That Deponent's conference with said co-defendants took place in said courtroom and was conducted in a whisper as Court was in session; that Deponent had not time and did not see or examine the indictment in the above-entitled case, and did not discuss the charges there-

in contained, the legal implications thereof, nor the possible defenses thereto with said co-defendants and that the entire conference with said co-defendants was a hurried, whispered one and occupied only a few minutes in time.

Further Deponent sayeth not.

(S) Archie Katcher.

STATE OF MICHIGAN,
COUNTY OF WAYNE—SS.

On this 20th day of February, A.D. 1946, before me, a Notary Public in and for said County and State, personally appeared Archie Katcher, who being by me first duly sworn, did depose and say that he has read the foregoing affidavit, that the same is true of his own knowledge except as to matters therein stated to be upon information and belief, and as to those matters he believes it to be true.

(S) Hamie Owen,
Notary Public,
Wayne County, Michigan.

My commission expires 3/18/46.

AFFIDAVIT IN SUPPORT OF WRIT OF HABEAS CORPUS

(Filed Feb. 21, 1946)

STATE OF MICHIGAN,
COUNTY OF WAYNE—SS.

HARRY OKRENT being first duly sworn, deposes and says that he is a member of the State Bar of Michigan and was admitted to practice October 25, 1938; that at the present time and since August 1, 1942 he has been continuously employed and associated with the law firm

of Berger, Manason & Kayes, 1550 National Bank Building, Detroit, Michigan;

Deponent further says that on September 25, 1943, he and Isadore Berger, senior member of said firm, visited Grafyn Marianna von Moltke at the Wayne County jail on behalf of her husband, Heinrich von Moltke, who had been a former instructor of Deponent at Wayne University: that Deponent and Berger made said visit primarily to enable Deponent to advise Heinrich von Moltke what steps to take and secondarily to determine the advisability of representing Marianna von Moltke at the trial of her case; that before making said visit deponent had been advised by Heinrich von Moltke that neither he nor his wife had any funds or property with which to retain or pay counsel, and deponent was also aware of the fact that Heinrich von Moltke was relieved of his duties at Wayne University shortly following the arrest of his wife.

Deponent further says that during the interview with Grafyn Marianna von Moltke, she appeared to be highly nervous, unstrung and distraught and that her principal concern was for her husband and diabetic child; that she was apparently unable to carry on a connected conversation and to respond well to questions; that she frequently interrupted the questioning to make inquiries about her son and her husband and requested Deponent to give certain instructions to her husband concerning the treatment and care of her son, which Deponent assured her he would do.

Deponent further says that neither during said interview nor at any other time prior to the time Deponent represented Grafyn Marianna von Moltke on her motion to withdraw her plea of guilty did either he or Isadore Berger (who saw her only once and in Deponent's presence) discuss with her any possible legal defenses to the charges made against her, nor did they advise or discuss with her the nature or implications of such charges or in any way suggest or intimate to her what they might have considered her legal rights to be or what course

of action she should pursue; that to the best of Deponent's recollection and belief the only interview he had with Grafyn Marianna von Moltke until after January 1, 1944, was the one on September 25, 1943 at the Wayne County jail.

Deponent further states that sometime shortly after said interview he advised Heinrich von Moltke that neither he nor his firm would be able to take the case.

(S) Harry Okrent.

STATE OF MICHIGAN,
COUNTY OF WAYNE—SS.

On February 20, 1946, before me, a Notary Public in and for said County, personally appeared Harry Okrent who being by me duly sworn did depose and say that he has read the foregoing affidavit by him subscribed and that the same is true of his own knowledge except as to matters therein stated to be on information and belief and as to those matters he believes it to be true.

(S) Hamie Owen,
Notary Public, Wayne County, Mich.

My commission expires 3/18/46.

ORDER TO SHOW CAUSE

(Filed Feb. 7, 1946)

At a session of said Court held in the Federal Court House at Detroit, Michigan, February 7, 1946.

Present: Honorable Ernest A. O'Brien, District Judge.

Good cause appearing therefor, and upon reading and filing the petition for writ of habeas corpus herein:

It Is Ordered that A. Blake Gillies, Superintendent of the Detroit House of Correction at Plymouth, Michi-

gan, or any deputy superintendent, appear before this Court on the 21st day of February, 1946 at 11:00 o'clock in the forenoon, to Show Cause, if any he has, why a writ of habeas corpus should not be issued as prayed for, and that a copy of this order and of the petition for such writ be served upon such superintendent or deputy superintendent and upon the United States District Attorney for this district within two days from the date hereof.

Ernest A. O'Brien,
District Judge.

ORDER FOR WRIT OF HABEAS CORPUS

(Filed Feb. 21, 1946)

At a session of said court held at the Federal Court House at Detroit, Michigan, this 21st day of February, 1946.

Present: Honorable Ernest A. O'Brien, District Judge.

This matter coming on to be heard upon an order to show cause why writ of habeas should not issue herein and the answer thereto, and this Court having heard the arguments of counsel and being duly advised in the premises:

It Is Ordered that writ of habeas corpus issue as prayed for in said petition returnable for hearing before this Court on March 11th, 1946, at 2 o'clock P.M.

Ernest A. O'Brien,
District Judge.

WRIT OF HABEAS CORPUS

(Filed March 9, 1946)

The President of the United States to A. Blake Gillies, Superintendent of the Detroit House of Correction at Plymouth, Michigan, or any deputy superintendent, Greetings:

We Command that you have the body of Grafin Marianna von Moltke by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name she shall be called or charged, before the District Court of the United States in and for the Eastern District of Michigan, Southern Division, at the Federal Court House in Detroit, Michigan, on the 11th day of March, 1946, at 2 o'clock P.M., to do and receive what shall then and there be considered concerning the said Grafin Marianna von Moltke, and have you then and there this Writ.

Witness the Honorable Ernest A. O'Brien, Judge of the District Court of the United States for the Eastern District of Michigan, Southern Division, this 21st day of February, 1946.

George M. Read,
Clerk of the District Court of the
United States for the Eastern
District of Michigan, Southern
Division.

By Albert L. Allred,
Deputy Clerk.
(Seal of Court)

ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS

(Filed Feb. 20, 1946)

Now comes A. Blake Gillies, Superintendent of the Detroit House of Correction at Plymouth, Michigan, by John C. Lehr, United States Attorney, and files this Answer to Show Cause why a Writ of Habeas Corpus should not be issued as prayed for in the Petition filed in this matter.

1. In answer to the allegations contained in Paragraph 1, he does not have any information in regard thereto, and therefore he does not deny or admit the same but leaves the Petitioner to her proofs.

2. In answer to the allegations contained in Paragraph 2, he denies that she is unjustly and unlawfully detained and imprisoned under the authority of the United States.

3. In answer to the allegations contained in Paragraph 3, he admits the same.

4. On information and belief he denies any and all allegations contained in Paragraph 4.

5. On information and belief he denies any and all allegations contained in Paragraph 5 in which the Petitioner claims that she was either misled, coerced or betrayed in waiving her rights under law. On information and belief he further denies that any misrepresentations of any kind were made to her by any of the persons mentioned in her Petition and that no undue influence, pressure or constraint was ever exerted upon her by any of the persons mentioned in her Petition at any time whatsoever.

6. On information and belief he further states that an indictment was returned by the Grand Jury of the United States for the Eastern District of Michigan, Southern Division, on the 17th day of September, 1943, charging the Petitioner herein with conspiracy to violate Section

32, Title 50 USC, known as the Espionage Act, a certified copy of said indictment is hereto attached, marked Exhibit A, and made a part hereof.

7. On information and belief he further states that on September 22, 1943, the Petitioner herein was arraigned on said indictment before the Honorable Edward J. Moinet, District Judge, for the Eastern District of Michigan, Southern Division, and that at the time thereof, the Petitioner stood mute and the Court entered a plea of not guilty, as shown by the docket entry of thhe United States Clerk, a certified copy of which is hereto attached, is marked Exhibit B and is made a part hereof.

8. On information and belief he further states that on October 7, 1943, the Petitioner did enter a plea of guilty to the aforementioned indictment and at the same time did sign and execute a waiver of counsel and right to a jury trial, a certified copy of the entry of said plea is hereto attached, marked Exhibit C, and made a part hereof and a certified copy of said waiver is hereto attached, marked Exhibit D and made a part hereof.

9. On information and belief he further states that on August 7, 1944, the Petitioner filed a Motion, with an affidavit in support thereof, for leave to withdraw her plea of guilty, a copy of said Motion and affidavit are hereto attached, marked Exhibits E and F and made a part hereof.

10. On information and belief he further states that on November 15, 1944, the Motion of this Petitioner for leave to withdraw her plea of guilty was argued by her counsel and that on the same day an Order was entered by the Court denying siad Motion, a copy of said Order is hereto attached, marked Exhibit G, and made a part hereof.

11. On information and belief he further states that on November 15, 1944, a sentence of four years was imposed upon the Petitioner and an Order of Commitment was issued by the Court ordering this Petitioner committed to the custody of the Attorney General or his

authorized representatives for imprisonment in a Federal Institution to be designated by the Attorney General, or his authorized representatives, a copy of said Order of Commitment is hereto attached, marked Exhibit H and made a part hereof.

12. On information and belief he further states that the affidavit, which this Petitioner executed and filed in support of her motion to withdraw her plea of guilty and referred to herein as Exhibit D, contains the following statement: "That she does not charge that any physical threats were made by the Federal Bureau of Investigation or by the Office of the United States District Attorney, nor were any promises directly made to her to induce her to plead guilty."

13. On information and belief he further states that the Petitioner did enter her plea of guilty to the indictment referred to herein as Exhibit A, voluntarily and understandingly, and voluntarily and understandingly waived her right to be represented by counsel. He further states that at no time were threats, physical violence or undue influence exerted upon her, nor were any promises of any kind made to the Petitioner to induce her to plead guilty to the said indictment.

Wherefore, he moves that the Order to Show Cause filed in this matter be dismissed and the Petition for Writ of Habeas Corpus be denied.

A. Blake Gillies.

On this 19th day of February, A.D. 1946, personally appeared the above named, A. Blake Gillies, who made oath that he has read the foregoing Answer by him subscribed and that he knows the contents thereof, that the same is true of his own knowledge except as to those matters therein stated to be on information and belief and as to those matters he believes it to be true.

John C. Miller,
Notary Public, Wayne County, Mich.
My commission expires: Dec. 5, 1949

PETITIONER'S EXHIBIT 1

Vio: Section 34, Title 50, USC

UNITED STATES OF AMERICA

**IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION**

Of the June Term, A.D. 1943

The Grand Jurors of the United States of America, duly empaneled and sworn at the June Term of the District Court of the United States for the Eastern District of Michigan, Southern Division, and inquiring for that District, on their oaths present:

That continuously, and at all times from the first day of December, 1938, to the date of the presentation and filing of this indictment, at the Eastern District of Michigan, Southern Division, and within the jurisdiction of this Court, at Manhattan, New York; at Chicago, Illinois; at Berlin, Germany; at Budapest, Hungary; at Lisbon, Portugal; at Stockholm, Sweden; at Couronncas, Switzerland; and at other places to the Grand Jurors unknown,

THERESA BEHRENS, alias Teri Behrens, alias Therese Behrens, alias Mrs. Theresa Behrend, alias Terus, alias Teruce, hereinafter referred to as Theresa Behrens;

GRACE BUCHANAN-DINEEN, alias Grace Buchanan, alias Grace Dineen, alias Miss Smith, hereinafter referred to as Grace Buchanan Dineen;

BERTRAND STUART HOFFMAN, alias Bert Hoffman, hereinafter referred to as Bertrand Stuart Hoffman;

CARL JOHN WILHELM LEONHARDT, alias Karl Leonhardt; hereinafter referred to as Carl John Leonhardt;

EMMA ELISE LEONHARDT, alias Mrs. Karl Leonhardt, hereinafter referred to as Emma Elise Leonhardt;

WALTER JOSEPH ABT, alias Walter Abt, hereinafter referred to as Walter Abt;

DR. FREDERICK WILLIAM THOMAS, alias Dr. Fred William Thomas, alias, Dr. Thomas, hereinafter referred to as Dr. Fred William Thomas; and

GRAFIN MARIANNA VON MOLTKE, alias Countess Von Moltke, hereinafter referred to as Grafina Marianna Von Moltke;

the defendants herein, whose full and true names are, other than as herein stated, to the Grand Jurors unknown, unlawfully, wilfully and feloniously did combine, conspire, confederate and agree together, one with the other and each with the other; and with the government of the German Reich, and with

CARLOS GALINO DaSILVA;

SARI DeHAJEK, alias Sari DeHajek, alias Charlotte Rozinek, alias Mrs. Gyula Rozinek, hereinafter referred to as Sari DeHajek;

THEODORE DONAY, alias Theo Donay, hereinafter referred to as Theodore Donay;

One ILSE, whose true last name is to the Grand Jurors unknown;

MARTHA KAUFMAN;

GEORGE KREIS;

DR. JOHN LOENNGREN;

MR. MILLER, alias Mr. Muller, whose true first name is to the Grand Jurors unknown;

OSKAR RENNER;

GYULA ROZINEK, alias Gyula DeHajek, alias Julius Rozinek, alias Jules Rozinek, hereinafter referred to as Gyula Rozinek;

INGEBORG SAENGER, alias Ingeborg Rozinek Saenger, alias Ingelein, hereinafter referred to as Ingeborg Saenger;

SENHORA ISABEL MACHADO SANTOS;

ERNA SCHOLZ;

DR. SPAUN, alias Mr. Fillier, whose full, true name is to the Grand Jurors unknown, hereinafter referred to as Dr. Spaun;

COUNT LINGEN VEVEY; and

HEINRICH WILLMES;

whose full and true names are, other than as herein stated, to the Grand Jurors unknown, and with divers other persons whose names are to the Grand Jurors unknown who are not named herein as defendants, but are hereinafter referred to as co-conspirators, to commit offenses against the United States, to-wit: to violate Section 32, Title 50, USC (Act of June 15, 1917, Chapter 30, Title 1, Section 2; 40 Stat. 218) in the manner and by the means hereinafter set forth.

It was the plan and purpose of said conspiracy that the defendants and co-conspirators would communicate, deliver, and transmit and attempt to communicate, deliver and transmit, and aid and induce each other and divers other persons to the Grand Jurors unknown, to communicate, deliver and transmit to a foreign government, to-wit: the government of the German Reich, and to representatives, officers, agents, employees, subjects and citizens thereof, documents, writings, code books, signal books, sketches, photographs, photographic negatives, blueprints, plans, maps, models, notes, instruments, appliances, and information relating to the national defense of the United States, with intent and reason to believe that said documents, writings, code books, signal books, sketches, photographs, photographic negatives, blueprints, plans, maps, models, notes, and instruments, appliances and information would be used to the injury of the United States and to the advantage of a foreign

nation, to-wit: the government of the German Reich, and that the defendants and co-conspirators, while the United States was at war with the government of the German Reich, would collect, record, publish, communicate and attempt to elicit information with respect to the movements, numbers, descriptions, condition and disposition of the armed forces, ships, aircraft, and war materials of the United States, and with respect to works and measures undertaken for and in connection with and intended for the fortifications and defense of places, and with respect to other information relating to the public defense which might be useful to the enemy, the said German Reich, with intent that the same would be communicated to the enemy; to-wit: the government of the German Reich.

It was a part of said conspiracy that the government of the German Reich and certain of the co-conspirators, including Gyula Rozinek, Sari DeHajek, Dr. Spaun, Ilse, and George Kreis, as agents, representatives, and employees of said government of the German Reich, would direct, encourage and maintain the defendants and certain of the co-conspirators within the United States for the purpose of communicating, delivering, and transmitting the aforementioned material and information relating to the national defense of the United States to the government of the German Reich, and for the purpose of collecting, recording, publishing, communicating and attempting to elicit the aforementioned information relating to the public defence of the United States, which might be useful to the enemy, to-wit: the government of the German Reich.

It was further a part of said conspiracy that the defendants and divers other persons to the Grand Jurors unknown would be employed in various capacities and activities within the United States for the purpose of being in a position to communicate, deliver and transmit, and attempt to communicate, deliver and transmit, and to aid and induce divers other persons to the Grand Jurors unknown to communicate, deliver and transmit said material and information relating to the national

defense of the United States to the government of the German Reich, and for the purpose of collecting, recording, publishing, communicating and attempting to elicit said information relating to the public defense of the United States which might be useful to the enemy, to wit: the government of the German Reich.

It was further a part of said conspiracy that certain of the co-conspirators, including:

Ingeborg Saenger, at Stockholm, Sweden,

Erna Scholz, at Stockholm, Sweden,

Dr. John Loenngren, at Stockholm, Sweden,

Martha Kaufmann, at Stockholm, Sweden,

Carlos Galino DaSilva, at Lisbon, Portugal,

Senhora Isabel Machado Santos, at Lisbon, Portugal,

George Kreis, at Lisbon, Portugal,

Oskar Renner, at Budapest, Hungary, and

Count Lingen Vevey, at Couronncas, Switzerland,

would establish and maintain addresses at such respective places for the purpose of receiving said material and information and further, that said co-conspirators would reside at said respective places and would receive such material and information from the defendants, which said material and information the said co-conspirators would forward, communicate, deliver, and transmit to the government of the German Reich and to certain of the other co-conspirators within the Axis-dominated countries, including Gyula Rozinek, Sari DeHajek, Dr. Spaun, and George Kreis, and to divers other persons within Germany to the Grand Jurors unknown.

It was further a part of said conspiracy that certain of the defendants, including Grace Buchanan Dineen, Theresa Behrens, Carl John Leonhardt, Emma Elise Leonhardt, and Grafyn Marianna von Moltke, would meet

and confer with each other and with persons who are not defendants or co-conspirators, for the purpose of eliciting information relating to the public defense which might be useful to the government of the German Reich.

It was further a part of said conspiracy that the information obtained and collected as aforesaid, relating to the national and public defense of the United States would be communicated to the government of the German Reich by various and sundry means, including invisible writing processes; that certain of the defendants, including Grace Buchanan Dineen, Theresa Behrens, Dr. Fred Williams Thomas, and the co-conspirators, including Theodore Donay, would procure and furnish the chemicals and ingredients for the preparation of said processes;

OVERT ACTS

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present and find that certain of said defendants, conspirators and co-conspirators herein designated, at the several times and places hereinafter mentioned, actually did and performed certain things and overt acts in pursuance of and in execution of and to effect the object of said conspiracy, that is to say:

I.

That in pursuance of said conspiracy and to effect the object and purpose thereof, Gyula Rozinek, on December 23, 1938, at New York, New York, entered the United States at the port of New York;

II.

That in pursuance of said conspiracy and to effect the object and purpose thereof, Sari DeHajek, on December 23, 1938, at New York, New York, entered the United States at the port of New York;

III.

That in pursuance of said conspiracy and to effect the object and purpose thereof, Gyula Rozinek, during the

spring of 1939, the exact date being to the Grand Jurors unknown, and hence not set forth herein, traveled out of the United States to Mexico and on March 27, 1939, at Laredo, Texas, re-entered the United States;

IV.

That in pursuance of said conspiracy and to effect the object and purpose thereof, Sari DeHajek, during the month of May, 1939, departed from the United States and traveled to Budapest, Hungary;

V.

That in pursuance of said conspiracy and to effect the object and purpose thereof, Gyula Rozinek, on February 27, 1940, at Los Angeles, California, procured an extension of his permission to remain in the United States until July 2, 1941;

VI.

That in pursuance of said conspiracy and to effect the object and purpose thereof, Theresa Behrens, on March 14, 1941, at Detroit, Michigan, wrote a letter to I. S. Wixon, District Director, United States Immigration Service, San Francisco, California;

VII.

That in pursuance of said conspiracy and to effect the object and purpose thereof, Theresa Behrens, on April 1, 1941, at Detroit, Michigan, wrote a letter to I. S. Wixon, District Director, United States Immigration Service, San Francisco, California;

VIII.

That in pursuance of said conspiracy and to effect the object and purpose thereof, Theresa Behrens, at Detroit, Michigan, on or about April 12, 1941, executed a "Bond Conditioned for the Delivery of an Alien" in behalf of Gyula Rozinek;

IX.

That in pursuance of said conspiracy and to effect the object and purpose thereof, Sari DeHajek and Grace Buchanan Dineen, at Budapest, Hungary, met and conferred during the month of May, 1941;

X.

That in pursuance of said conspiracy and to effect the object and purpose thereof, Sari DeHajek, Gyula Rozinek and Grace Buchanan Dineen, during the month of June, 1941, at Budapest, Hungary, met and conferred;

XI.

That in pursuance of said conspiracy and to effect the object and purpose thereof, at Budapest, Hungary, Sari DeHajek, Gyula Rozinek, Dr. Spaun and Grace Buchanan Dineen met and conferred, on or about the 10th day of July, 1941;

XII.

That on or about August 21, 1941, in pursuance of said conspiracy and to effect the object and purpose thereof, Grace Buchanan Dineen and Gyula Rozinek traveled from Budapest, Hungary, to Berlin, Germany;

XIII.

That on or about August 22, 1941, in pursuance of said conspiracy and to effect the object and purpose thereof, in Berlin, Germany, Ilse conferred with Grace Buchanan Dineen and instructed her in the use of secret ink and microphotographs;

XIV.

That on, about and during the days of October 4, 5, 6, 7 and 8, 1941, in pursuance of said conspiracy and to

effect the object and purpose thereof, Grace Buchanan Dineen traveled from Budapest, Hungary, to Lisbon, Portugal;

XV.

That on or about October 10, 1941, at Lisbon, Portugal, in pursuance of said conspiracy and to effect the object and purpose thereof, Grace Buchanan Dineen met and conferred with George Kreis;

XVI.

That on or about October 27, 1941, in pursuance of said conspiracy and to effect the object and purpose thereof, Grace Buchanan Dineen arrived at and entered the United States at the port of New York;

XVII.

That on or about November 1, 1941, in pursuance of said conspiracy and to effect the object and purpose thereof, Grace Buchanan Dineen traveled from New York, New York, to Detroit, Michigan;

XVIII.

That on or about November 1, 1941, in pursuance of said conspiracy and to effect the object thereof, at Detroit, Michigan, Theresa Behrens and Grace Buchanan Dineen met and conferred at 2230 Witherell Street;

XIX.

That on or about November 1, 1941, in pursuance of said conspiracy and to effect the object thereof, Theresa Behrens and Grace Buchanan Dineen visited the Statler Hotel, Detroit, Michigan, and there collaborated in dispatching cablegrams to Carlos Galino DaSilva and Senhora Isabel Machado Santos;

XX.

That on or about November 1, 1941, in pursuance of said conspiracy and to effect the object thereof, Bertrand Stuart Hoffman, Theresa Behrens and Grace Buchanan Dineen met and conferred at 2230 Witherell Street, Detroit, Michigan;

XXI.

That on or about November 2, 1941, in pursuance of said conspiracy and to effect the object thereof, Theresa Berhens, Dr. Fred William Thomas and Grace Buchanan Dineen met and conferred at 1508 Eaton Tower, Detroit, Michigan;

XXII.

That on or about November 3, 1941, in pursuance of said conspiracy and to effect the object thereof, Grace Buchanan Dineen traveled from Detroit, Michigan, to New York, New York;

XXIII.

That on or about December 19, 1941, in pursuance of said conspiracy and to effect the object thereof, Grace Buchanan Dineen traveled from New York, New York, to Detroit, Michigan;

XXIV.

That on or about December 20, 1941, in pursuance of said conspiracy and to effect the object thereof, Theresa Behrens, Grace Buchanan Dineen, and Marianna Von Moltke met and conferred at 4553 Seebaldt Avenue, Detroit, Michigan;

XXV.

That on or about December 20, 1941, in pursuance of said conspiracy and to effect the object thereof, Dr.

Fred William Thomas, and Grace Buchanan Dineen met and conferred at 1508 Eaton Tower, Detroit;

XXVI.

That on or about December 21, 1941, at Detroit, Michigan, in pursuance of said conspiracy and to effect the object thereof, Grace Buchanan Dineen deposited for safe keeping with Theresa Behrens \$1,000 of money which had been furnished to Grace Buchanan Dineen by George Kreis;

XXVII.

That on or about March 18, 1942, at Detroit, Michigan, in pursuance of said conspiracy and to effect the object thereof, Theresa Behrens wrote and mailed letters to Ingeborg Saenger at Stockholm, Sweden, and to Sari and Gyula Rozinék in care of said Ingeborg Saenger;

XXVIII.

That on or about March 22, 1942, at Detroit, Michigan, in pursuance of said conspiracy and to effect the object thereof, Theresa Behrens assisted Grace Buchanan Dineen in preparing and dispatching a cablegram to Ingeborg Saenger at Stockholm, Sweden;

XXIX.

That on or about March 28, 1942, at 4553 Seebaldt Avenue, Detroit, Michigan, in pursuance of said conspiracy and to effect the object thereof, Marianna Von Moltke introduced Edward Arndt to Grace Buchanan Dineen;

XXX.

That on or about March 29, 1942, at Detroit, Michigan, in pursuance of said conspiracy and to effect the object thereof, Marianna Von Moltke met and conferred with Grace Buchanan Dineen;

XXXI.

That on or about June 20, 1942, at Grosse Pointe, Michigan, in pursuance of said conspiracy and to effect the object thereof, Marianna Von Moltke met and conferred with Grace Buchanan Dineen;

XXXII.

That on or about January 27, 1943, at Detroit, Michigan, in pursuance of said conspiracy and to effect the object thereof, Marianna Von Moltke, Theresa Behrens, Emma Elsie Leonhardt and Grace Buchanan Dineen met and conferred at the residence of Grace Buchanan Dineen;

XXXIII.

That on or about March 30, 1942, at Detroit, Michigan, in pursuance of said conspiracy and to effect the object thereof, Theresa Behrens arranged a conference between Grace Buchanan Dineen and one Frank P. Illsley;

XXXIV.

That on or about April 29, 1942, at Detroit, Michigan, in pursuance of said conspiracy and to effect the object thereof, Theresa Behrens met and conferred with Heinrich Willmes;

XXXV.

That on or about September 10, 1942, at Detroit, Michigan, in pursuance of said conspiracy and to effect the object thereof, Theresa Behrens presented to Grace Buchanan Dineen an officer in the Naval forces of the United States;

XXXVI.

That on or about October 7, 1942, at Detroit, Michigan, in pursuance of said conspiracy and to effect the object

thereof, Theresa Behrens met and conferred with Grace Buchanan Dineen;

XXXVII.

That on or about August 29, 1942, at Detroit, Michigan, in pursuance of said conspiracy and to effect the object thereof, Walter Abt met and conferred with Grace Buchanan Dineen;

XXXVIII.

That on or about October 6, 1942, at Detroit, Michigan, in pursuance of said conspiracy and to effect the object thereof, Walter Abt, Carl John Leonhardt, Emma Elise Leonhardt met and conferred with Grace Buchanan Dineen;

XXXIX.

That on or about October 19, 1942, at Detroit, Michigan, in pursuance of said conspiracy and to effect the object thereof, Walter Abt met and conferred with Grace Buchanan Dineen;

XL.

That on or about November 16, 1942, at Detroit, Michigan, in pursuance of said conspiracy and to effect the object thereof, Walter Abt met and conferred with Grace Buchanan Dineen;

XLI.

That on or about December 16, 1942, at Detroit, Michigan, in pursuance of said conspiracy and to effect the object thereof, Theresa Behrens, Carl Leonhardt, Emma Elise Leonhardt and Grace Buchanan Dineen met and conferred with one William Reinhardt;

XLII.

That on or about April 14, 1942, at Detroit, Michigan, in pursuance of said conspiracy and to effect the object thereof, Dr. Fred William Thomas met and conferred with Grace Buchanan Dineen

XLIII.

That on or about April 27, 1942, at Detroit, Michigan, in pursuance of said conspiracy and to effect the object thereof, Dr. Fred William Thomas furnished to and supplied Grace Buchanan Dineen with chemicals for making secret ink;

XLIV.

That on or about July 21, 1942, at Detroit, Michigan, in pursuance of said conspiracy and to effect the object thereof, Dr. Fred William Thomas met and conferred with Grace Buchanan Dineen;

XLV.

That on or about November 12, 1942, at Detroit, Michigan, in pursuance of said conspiracy and to effect the object thereof, Dr. Fred William Thomas met and conferred with Grace Buchanan Dineen;

XLVI.

That on or about November 28, 1942, at Detroit, Michigan, in pursuance of said conspiracy and to effect the object thereof, Dr. Fred William Thomas furnished to and supplied Grace Buchanan Dineen with chemicals for making secret ink;

XLVII.

That on or about May 8, 1942, at Detroit, Michigan, Bertrand Stuart Hoffman, in pursuance of said con-

spiracy and to effect the object thereof, met and conferred with Grace Buchanan Dineen;

Against the peace and dignity of the United States and contrary to the form of the Statute of the United States in such case made and provided (Section 34, Title 50, USC).

John C. Lehr,
United States Attorney
for the Eastern District
of Michigan.

John W. Babcock,
Assistant U. S. Attorney.

This is a true bill.

.....
Foreman

EXHIBIT "C"**(Filed Oct. 7, 1943)****IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION****United States of America****vs.****Cr. #27301****Grafin Mariana Von Moltke**

**At a session of said Court held in the City of Detroit
on October 7, A.D. 1943.**

**Present: Honorable Arthur F. Lederle, U. S. District
Judge.**

CHANGE OF PLEA

The defendant Grafin Mariana Von Moltke being present in Court, and having been fully informed of her constitutional rights to counsel, waives the appointment of counsel by the Court; thereupon by leave of the Court withdraws her plea of not guilty heretofore entered herein, and pleads guilty as charged in the indictment heretofore filed against her.

Thereupon the Court does now defer sentence without date, and refers the case to the United States Probation Officer for this District for investigation and report, and remands defendant into custody of the United States Marshal.

**Arthur F. Lederle,
U. S. District Judge.**

UNITED STATES OF AMERICA,



OST-71943 M

27301

Ex parte Memorial Motion

State of Maryland vs. [illegible]

I, [illegible], being the
plaintiff in the above entitled cause, having been
admitted to the bar of the Court of First Instance, do hereby
pledge, and having taken oath to the Court whether
in his counsel to be assigned by the Court, or hereby,
in open Court, voluntarily and without compulsion by right
be represented by counsel at all times in this cause.

Attorney at Law
Defendant.

Witnessed by:

Joseph E. [illegible]
[illegible]

Examined and approved:

Arthur H. Hedrick
Clerk of the District Court

Exhibit D

EXHIBIT E

MOTION FOR LEAVE TO WITHDRAW PLEA OF GUILTY

Now comes Marianna von Moltke, defendant in the above entitled cause, by Harry Okrent, her attorney, and files this, her motion for leave to withdraw her plea of guilty heretofore entered, and for leave to plead not guilty in said cause, for the following reasons:

1. That she is not guilty of the crime charged;
2. That the plea of guilty heretofore entered by said defendant was made under circumstances of extreme emotional stress and during a time of extreme mental disturbance, without knowledge of her legal rights and without a thorough understanding of the nature of the offense charged;
3. That justice requires that she be permitted to change her plea;
4. That the acceptance by the Court of the plea of guilty is a violation of Amendment 6 to the Constitution of the United States insofar as the defendant herein did not, until the date of the entry of said plea of guilty, have the assistance of counsel, as provided for in said Amendment 6.

Wherefore, defendant prays that an order be entered withdrawing the plea of guilty heretofore entered, and striking same from the records of said Court, and permitting defendant to enter a plea of not guilty.

This motion is based upon the files and records of this Court and cause, and upon the affidavit in support of said motion, filed in said cause.

Harry Okrent,
Attorney for Defendant,
1550 National Bank Building,
Detroit 26, Michigan.
Cherry 8028.

Dated: Detroit, Michigan
August 7th, 1944

EXHIBIT F**AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE
TO WITHDRAW PLEA OF GUILTY**

STATE OF MICHIGAN,
COUNTY OF WAYNE—SS:

MARIANNA von MOLTKE being first duly sworn, deposes and says:

That she is the defendant in the above entitled cause and that she makes this affidavit in support of her motion for leave to withdraw plea of guilty filed therein;

That on, to-wit: August 24th, 1943 she was arrested on a Presidential Warrant as a dangerous enemy alien and committed for detention in the Immigration Detention Home in the City of Detroit, Wayne County, Michigan;

That at the time of her arrest she did not know that a federal indictment had been issued charging her with a criminal offense; that the said indictment was handed to her on, to-wit: September 18th, 1943, and that she appeared before the Honorable Edward J. Moinet, District Judge of the United States on, to-wit: September 21st, 1943; that between the 24th day of August, 1943, and, to-wit: the 21st day of September, 1943, she had not had the opportunity of consulting with any attorney and had not been advised that it was her right to have the assistance of counsel; that attorney Archie Katcher was appointed by the Honorable Edward J. Moinet to represent her at the time of her arraignment before the said Honorable Edward J. Moinet on, to-wit: September 21st, 1943; that she had a very brief conversation with the said Archie Katcher, and that she did not discuss the merits of the case or the probabilities of defense with him, but the substance of their conversation related only to the advisability of standing mute rather than enter a plea of not guilty, and for general reasons of policy said

Archie Katcher advised her to stand mute, and that on said day a plea of not guilty was entered for her;

That on, to-wit: August 25th, 1943, her husband, an instructor at Wayne University in the City of Detroit, was suspended and relieved of his duties;

That her youngest son, aged ten years, suffers of diabetes, and he requires constant supervision and attention; that this fact, together with the fact that her husband had been relieved of his position and that he is not equipped to earn a livelihood by any means other than by teaching, disturbed her greatly; that she feared that the health of her youngest would be seriously impaired because of her incarceration and because her husband would not be able to earn sufficient funds to provide the necessary attention; that she did not know, and was not told, that an accused person benefits by the presumption of innocence, under the American system of jurisprudence; and that she felt her situation to be completely hopeless because she knew of no way in which she could prove her innocence; that she has since been informed of the presumption of innocence which attaches to a person accused of crime, and that she feels that, under these circumstances, she cannot possibly be convicted of the crime with which she is charged because she is not guilty; but that on, to-wit: September 28th, 1943 she saw no hope and no future for herself or her family, and on said date discussed with Assistant District Attorney John W. Babcock the advisability of pleading guilty in said cause, and suggested that she would possibly do so if she could be assured that the newspaper publicity which had so harmed her husband and family would stop, and if assurances could be given to her that she would not be deported after serving whatever term she was sentenced to serve, and if she could serve said sentence in an institution not too far away, so that she could see her husband and children from time to time; that said Assistant District Attorney John W. Babcock advised her that he could not assure her that the newspaper publicity would stop since he had no control over

the press; that he felt confident that her sentencing, if she pleaded guilty, would be in an institution not too far away, and that he felt, although he could not assure her of this, that deportation would not follow her release from incarceration after serving her sentence;

That in addition to herself, the defendants Hoffman, Behrens, Thomas, Buchanan-Dineen, Leonhardt, Leonhardt, and Abt were arrested at about the same time she was arrested, and that prior to, to-wit: October 7th, 1943 all but Hoffman and Thomas had pleaded guilty; that she was told repeatedly during her conversations with Mr. Dunham and Mr. Kirby of the Federal Bureau of Investigation, that Dr. Thomas would plead guilty, and that the entry of his plea was just a matter of time; that she was told repeatedly that her refusal to plead guilty would result in her being the only person to go on trial, with the attendant newspaper publicity that such a trial would necessarily entail; that she does not charge that any physical threats were made by the Federal Bureau of Investigation or by the Office of the United States District Attorney, nor were any promises directly made to her to induce her to plead guilty; that she does state however, that she was informed prior to, to-wit: October 7th, 1943, by Mrs. Theresa Behrens, a co-defendant, that if she failed to plead guilty, her husband would be implicated in the affair, and that although, on due consideration at the present time, she feels that it was ridiculous to attach any significance to this statement by Mrs. Behrens, at the time in question, because of her extreme state of nervousness, apprehension, despondency, and fear, she then felt on said date that the statement made by Mrs. Behrens could have a basis in fact;

That between to-wit: September 28th, 1943 and October 7th, 1943, while considering the advisability and desirability of pleading guilty, she discussed the matter at length with Mr. Collard and with Mr. Kirby of the Federal Bureau of Investigation on numerous occasions; that she asked Mr. Collard whether her husband was in any way involved in the matter, and that Mr. Collard replied to

her that he was sorry but that he could give her no information concerning that fact, and that although at present she realizes that that was a perfectly proper and normal answer, at the time it was given to her, because of her state of mind, this was confirmation of the statement made to her by Mrs. Behrens;

That in her discussion with Mr. Collard and other gentlemen of the Federal Bureau of Investigation she had called to their attention that is she pleaded guilty the Judge would not know how lightly she was implicated in the matter, if at all, and that if she was guilty at all it was because she had committed an error in judgment and not because she had any intent to be part of any conspiracy or to injure the United States of America in any way; that she might plead guilty if there were a way of calling to the sentencing Judge exactly what she did; that she was then informed that she could make her complete statement to the Probation Officer and that the said Probation Officer would file a report with the sentencing Judge and that, in this way, the exact facts could be gotten before the said sentencing Judge;

That on, to-wit: Thursday, October 7th, 1943 she was brought to the office of Mr. John W. Babcock, Assistant United States District Attorney, and informed him that, although she felt in her heart she was not guilty, she saw no other course but to plead guilty; that in the absence of the Honorable Edward J. Moinet she was taken before the Honorable Arthur F. Lederle, District Judge of the United States, at which time she was asked by said Judge Lederle whether she wished to plead guilty, and that she replied that she did; that the Honorable Judge Lederle then asked whether the indictment had been explained to her; that although it had not been explained to her, neither Mr. Babcock nor Mr. Collard, who were present with her in Court, assisted her in her dilemma, and that because, she had at that time determined to go through with the plea of guilty, she answered that it had been explained to her, although in fact it had not; that the moment she left the Courtroom on said date she turned

to Mr. Collard and informed him that the indictment had not been explained to her and that she felt that she had done the wrong thing; that between to-wit: September 21st, 1943 and October 7th, 1943 she did not have any advice of counsel or assistance of counsel;

That at about the end of October, 1943 she saw Mr. Collard at the County Jail, where she was confined, and advised him that she felt that she had made a big mess of things by pleading guilty; that it was not the proper thing to do;

That she did not know, and that no one informed her that she could request permission to withdraw her plea of guilty, and that she thought she had done an irrevocable act;

That from October, 1943 to around Christmas of 1943 she, on occasion, restated this conclusion to Messrs. Kirby, Dunham, Collard and Hanaway of the Federal Bureau of Investigation; that during the Christmas holidays she learned for the first time that a plea of guilty was not necessarily a final and irrevocable act, and that under certain circumstances the plea could be withdrawn; that she was so informed by a co-defendant who had been so informed by a visitor;

That on, to-wit: January 5th, 1944 she asked her Chief Matron to call Mr. Collard of the Federal Bureau of Investigation; that she advised Mr. Collard, when she saw him on said date, without revealing the source of her information, that she had the right to request permission to change her plea, and that she intended to do so; that she felt it was unfair to herself and her family to permit the people of Detroit to draw their conclusions from her plea, and that the sentencing Judge would not have the facts before him; that she was informed that she could write a statement for the press and inform the Judge of the facts before her sentence;

That on, to-wit: January 17th, 1944 she told Mr. Dunham of the Federal Bureau of Investigation, that she was still determined to withdraw her plea of guilty if she

could do so; that she was informed on said date that the District Attorney's Office was very busy on the Thomas case, which was scheduled to commence on, to-wit: January 20th, 1944, and that consequently she could not expect to have an opportunity to discuss the matter of the change of her plea with the District Attorney's Office in the immediate near future, but that Dr. Dunham would speak to the District Attorney and make her wishes clear;

That on, to-wit: January 18th, 1944 Messrs. Collard and Hove of the Federal Bureau of Investigation, saw her at the County Jail; that Mr. Huff advised her of the usual procedure in such matters and informed her that she could contact the Office of the United States Marshall and be brought before the Judge; but Mr. Huff further advised her that the Federal Bureau of Investigation requested that she work through them and the District Attorney rather than through the Marshall's Office, and that if she had definitely decided to withdraw her plea, and continued to feel that way in the near future, she could contact the District Attorney's Office rather than the Office of the United States Marshall;

That on, to-wit: January 20th, 1944, she contacted the Office of the United States District Attorney through her Matron at the County Jail; that in the afternoon of said date she was taken to the Office of the United States District Attorney, where she saw Mr. Lehr and Mr. Babcock; that she informed them that she wished to change her plea, and that Mr. Lehr informed her that he could see her point and that it was her right to request permission to withdraw her plea, but that he would appreciate it if he were given sufficient time to go over her statement which she had formerly given to the District Attorney, and that it would take about one week's time to dispose of the Thomas trial, at which time he would be able to go into the matter of her statement once again; that at the end of one week the Thomas trial was still on, and that shortly thereafter she again contacted the Office of the District Attorney, which procedure Mr. Lehr, the United States District Attorney, had asked her to follow

rather than to contact the Federal Bureau of Investigation; that she could not see Mr. Lehr because the Thomas trial continued until the end of February, 1944; that shortly after the conclusion of the Thomas trial, she had her Matron contact Mr. Lehr and asked if he did not want to go ahead and review her statement, would it be satisfactory if she made the usual arrangements through the Office of the United States Marshall; that she was advised that Mr. Lehr had requested a little additional time because he was leaving the city for a few days and that he would attend to her matter immediately upon his return;

That on, to-wit: March 13th, 1944 she again contacted the Office of the District Attorney and she was informed that the District Attorney wished her to wait a few days longer; that she saw Mr. Collard and Mr. Lehr on, to-wit: March 17th, 1944 and again affirmed her intention of withdrawing her plea, if possible;

That on, to-wit: the 24th day of March, 1944 she again saw Mr. Lehr, and the review of the statement was completed; that from said date until the end of April, 1944 she waited patiently in her cell at the County Jail expecting momentarily to be taken before the Honorable Edward J. Moinet;

That on, to-wit: April 23rd, 1944 Mr. Kirby of the Federal Bureau of Investigation advised her that Mr. Lehr was in Washington and asked her to be a little more patient, and that as soon as Mr. Lehr returned her matter would be attended to; that because she realized that Mr. Lehr was a busy man, and because she was extremely cooperative and did not want to hurry the Office of the United States District Attorney, and because she felt that any investigation they cared to make should be made by them without any attempt by her to rush matters, she made no further attempt to contact Mr. Lehr, and that on, to-wit: the 24th day of June, 1944 she was finally informed by the Office of the United States District Attorney that she would be called before the Honorable Edward J. Moinet on, to-wit: the 26th or the 27th

day of June, 1944, and that on the 29th day of June, 1944 she noticed an item in the Detroit Free Press which stated that she would be in Court on the 30th day of June, 1944;

That on, to-wit: June 30th, 1944 she was taken before the Honorable Edward J. Moinet, at which time she advised him that she wished to change her plea; that Judge Moinet informed her that she was entitled to representation by counsel, and that an attorney ought to make a motion for permission to withdraw her plea, and that if she had a preference as to counsel he would appoint such counsel as she desired him to appoint; that the matter was left in abeyance while she tried to select counsel;

That on, to-wit: July 3rd, 1944 she sent a letter to Judge Moinet advising him that she had no preference, and that she is now informed that Harry Okrent has been appointed counsel for the purpose of moving that she be allowed to withdraw her plea;

Further deponent saith not.

Marianna von Moltke.

STATE OF MICHIGAN,
COUNTY OF WAYNE—SS.

On this seventh day of August, 1944 before me, a Notary Public in and for said County and State personally appeared Marianna von Moltke who, being by me first duly sworn, did depose and say that she has read the foregoing Affidavit in Support of Motion for, Leave to Withdraw Plea of Guilty by her subscribed; that the same is true of her own knowledge except as to the matters stated therein to be upon information and belief, and as to those matters she believes it to be true.

(Sgd) Edward A. Trullard,
Notary Public,
Wayne County, Michigan.

My commission expires March 8, 1946.

EXHIBIT C

ORDER DENYING MOTION TO WITHDRAW
PLEA OF GUILTY

At a session of said Court, held on the 7th floor of the Federal Building in the City of Detroit, State of Michigan, on the 16th day of November, A.D. 1944.

Present: the Honorable Edward J. Moinet, United States District Judge.

This cause having come on for hearing upon the motion of the defendant Grafyn Marianna von Moltke for leave to withdraw her plea of guilty, heretofore entered, and for leave to enter a plea of Not Guilty to the indictment filed herein, the matter after hearing, having been submitted, the Court, after consideration of said motion and of the arguments presented on behalf of the respective parties hereto, specifically finds:

1. That the defendant Grafyn Marianna von Moltke was properly advised of her constitutional rights by the Court, both prior to and at the time she entered her plea of Guilty to the indictment;

2. That the plea of Guilty, entered several weeks after the filing of the indictment and her arraignment thereon, was submitted after due and careful deliberation;

3. That the defendant was advised of and thoroughly understood the nature of the charge contained in the indictment filed in this cause;

4. That no promises or inducements or threats were made for the purpose of obtaining the plea of Guilty, and that the entry of the plea of Guilty was not due to any misrepresentations;

5. That the motion praying for leave to withdraw the plea of Guilty was not filed within the period fixed by Rule II (4) adopted by the Supreme Court of the United States of America;

Wherefore, It Is Ordered that the said motion to withdraw the plea of guilty entered by the defendant Grafin Marianna von Moltke in the above entitled cause, be and the same is hereby denied.

Edward J. Moinet,
United States District Judge.

SPECIAL APPEARANCE

To the Clerk of said Court:

Please enter my appearance as attorney for defendants, Emma Elise Leonhardt and Grafin Marianna von Moltke, in accordance with the order of the Honorable Edward J. Moinet, District Judge, appointing me as their counsel, for arraignment only.

Dated: September 21, 1943.

Archie Katcher,
2420 National Bank Building,
Detroit 26, Michigan.
Cadillac 3855.

TRANSCRIPT OF TESTIMONY

Proceedings had and testimony taken before the Honorable Ernest A. O'Brien, District Judge, at Detroit, Michigan, on Monday, March 11, 1946, beginning at two o'clock in the afternoon.

Present:

Vincent Fordell, Esq., Assistant United States Attorney, appearing for the Respondent, the United States of America.

G. Leslie Field, Esq. and William O'Neill Kronner, Esq., appearing for the Petitioner, Grafin Marianna von Moltke.

MARIANNA von MOLTKE was thereupon called as a witness for and in her own behalf, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Kronner:

My full name is Grafin Marianna von Moltke. Grafin means "Countess" in English. I have never used that title in the United States. The name is used in this proceeding because it was probably in my passport and was the title given to me by the government. But my name is Marianna von Moltke. On August 24, 1943 I lived at 4553 Seyburn Avenue, Detroit, with my husband and my two children in the house where I was arrested. My husband was an instructor of German at Wayne University. Up to that time I had never had any contact with the courts or been involved in any court proceeding. I had never been a witness or been arrested. I had lived in Detroit since August 16, 1930. My youngest child is ill. He has sugar diabetes. He required at that time two injections of insulin per day and a strict diet. The insulin had to be administered and the diet was one that had to be supervised in accordance with instructions from a physician. I took care of that child constantly.

Q. Now on August 24, 1943 what happened?

A. I believe it was between 6 and 7 o'clock in the morning the FBI came to my house. There was six gentlemen, and Mr. Bert Collard, Jr. arrested me as he said on a presidential warrant.

Q. What did these men do when they came to your house?

A. Well, Mr. Collard said that I have to go with him in the living room, and I got dressed; I was in bed; and went with them.

Q. Did they search the house?

A. They asked permission of my husband to search the house, and he gave his permission. I turned my pocketbook over to my husband. I did not know that these men were coming.

Q. And then what happened?

A. I was taken to the Federal Building, to the offices of the Federal Bureau of Investigation. I was fingerprinted and photographed, and after that a Federal doctor took my pulse, and then afterwards I was questioned by Mr. Hanaway and Mr. Collard.

I was detained at the Immigration Detention Home, I believe it is called on Jefferson Avenue. I was questioned on the 24th, on the 25th on the 26th and on the 27th by Mr. Collard and Mr. Hanaway. I believe the gentlemen called for me around 10 o'clock in the morning, and we went to the building and the questioning lasted until 8, or 9 o'clock at night. During that time I was not allowed to see anybody else. I was kept in one room, and the room was locked, and I was released out of that room on the 28th of August, at around 6 o'clock in the evening. Up to that time I had not seen my husband.

Q. Up to that time did you have any word as to whether your diabetic child was being taken care of?

A. On the second day Mr. Collard was kind enough to get the permission from his superior to call my house and Mr. Collard talked to my husband, and I was sitting by, and he related what my husband said to him, and what he told him on my questioning. During this period of questioning by Mr. Collard and Mr. Hanaway they were courteous to me. They did not threaten me. They were friendly to me.

Q. And did they get your confidence?

A. Yes.

Mr. Fordell: I object to that last question, did they get her confidence.

The Court: There is no jury here to be affected by it.

Mr. Fordell: All right; I just want to object to conclusions.

The Court: All right. The witness evidently is a very intelligent witness. I do not think she needs much leading.

Q. (By Mr. Kronner): Finally was there a hearing before any Board?

A. At that time, or near that time, September the 1st I was called before the Enemy Alien Hearing Board.

I was taken there at 3:30 in the afternoon. The hearing was held at 10 o'clock.

Q. Up to that time did you know why you were being detained?

A. I did not. The only thing I knew it was on a presidential warrant, as a dangerous enemy alien.

Q. Did anybody tell you whether you could have an attorney or not?

A. No, but Mr. Hove said that the FBI is an investigating agency, and not a prosecuting, and as an enemy alien I was not allowed to see an attorney.

Q. Were you ever told that at any other time?

A. Mr. Keenan at the Immigration interpreted the notice for the Enemy Alien Hearing Board. It was stated that some friends or relatives or counsel could listen in at the Alien Hearing, but that I was not to be represented by a legal attorney.

Q. What was the next happening, if any, in connection with your detention?

A. On September 18th, around four o'clock in the afternoon, the indictment was handed to Mrs. Leonhardt and one to myself by the matron. It looked like a type-written report. I don't know how many pages.

Q. Did you understand what—the nature of it?

A. I did not.

Q. Did you read it?

A. Yes.

Q. At that time what did you call this document, at that time?

A. I did not know what to call that; I only could read—to my knowledge that would be an indictment.

Q. You called it an "indictment?"

A. Yes.

Q. Did anybody at that time inform you as to the nature of the charges in there?

A. No.

Q. Did you understand what was meant by a conspiracy?

A. I did not.

Q. You did not understand any of the charges in that document?

A. No, I only saw that things called "over" Acts. I did not have anything to do with that.

Q. What happened on the 21st of September?

A. On the 21st of September, after ten o'clock, Marshal Paige from the Marshal's office took us from the Immigration Building to the Federal Building, and Marshal Flynn brought us up to Judge Moinet's court—Mrs. Leonhardt and myself.

Q. What happened on your arrival there?

A. Judge Moinet was on the bench, and he informed Mrs. Leonhardt and me that we were entitled to counsel; in fact, he said that we had to have counsel, and Mrs. Leonhardt misunderstood Judge Moinet and said she had the means to appoint counsel, and I informed the counsel that I had no money, and Judge Moinet said he would appoint a counsel and attorney right away and would not have us arraigned before we had seen the attorney.

Q. What time was that—was that in the morning or afternoon?

A. It must have been in the morning, sir, around eleven or twelve o'clock.

Q. Did you remain, then, in the courtroom?

A. We were brought then to the bull pen to wait for the attorney.

Q. Were you taken back to the courtroom?

A. Mr. Babcock came down and informed Mrs. Leonhardt and I that she misunderstood the question; that she had no means to have an attorney. Mr. Babcock suggested going back to the courtroom of Judge Moinet and have this straightened out, and we both went along with Mr. Babcock to Judge Moinet's court.

Q. Then what happened?

A. The court was in session. Judge Moinet was on the bench, and there seemed to be a trial going on, because Judge Moinet appointed a lawyer in the courtroom. He said, "Come here, 'so-and-so', and help these two women out," and the young lawyer objected to that; he said he didn't want to have anything to do with that. But then he consented just for the arraignment, to help out, and he came over to us—we were sitting on the side bench—and he asked me, "How do you want to plead?" I said, "Not guilty." And he asked Mrs. Leonhardt, and she said the same thing. So he told us that, he whispered

to us, in fact, he went over it, whispered that it would not be advisable, but I do not know even now why, but he suggested it would be proper to stand mute.

Q. Did he explain the indictment to you?

A. No, he didn't see the indictment, sir.

Q. Did he tell you and advise you as to the nature of the charges against you?

A. He did not.

Q. The only advice he gave you was in connection with the plea?

A. Of entering the plea, as he called it.

Q. And he represented the two of you?

A. Yes, sir.

Q. And he talked to the both of you?

A. Yes, sir.

Q. And about how long a period of time was it that you had this conference with this attorney?

A. I would say three to five minutes the most.

Q. And you and Mrs. Leonhardt were sitting down?

A. Yes.

Q. And he was standing up?

A. Whispering to us.

Q. Was the conversation—the entire conversation—a whispered one?

A. Yes.

Mr. Fordell: I am going to object to some of these questions as being suggestive—"Was the conversation a whispered one?"

The Court: Undoubtedly they are, but the Court won't be influenced for that reason.

Mr. Fordell: All right.

Mr. Kronner: I tried to make my question as direct as possible.

The Court: They are very leading—you realize that, do you not? You know therefore they are objectionable. It is only in the interest of expedition that I am allowing it.

Q. Then what happened, after your conference with the attorney?

A. We were brought to the Wayne County Jail.

Q. And your plea was entered by the Court?

A. We stood mute and it was entered.

Q. Now, then, do you recall whether or not Judge Moinet made any further statement about an attorney?

A. Judge Moinet said he would appoint an attorney right away, and I understood that the gentleman was to be expected to come right away.

Q. Then where were you taken?

A. To the Wayne County Jail, That was on the 21st of September.

Q. Tell what happened between the 21st of September and the 28th of September.

A. On the 22nd of September Mrs. Behrens was brought into the Wayne County Jail, and I asked the matron to be kept by myself. The matron informed Mrs. Leonhardt and myself that she had strict orders to keep us incommunicado.

Q. Who were the other occupants of the cell block in the Wayne County Jail?

A. Mrs. Leonhardt and Mrs. Behrens.

Q. Now, what happened between the—were you visited by the agents of the Government?

A. Yes, since September 23 the agents of the Government visited us daily except Sunday.

Q. Do you recall who the agents were?

A. Mr. Kirby, and Mr. Dunham I believe, and I believe Mr. Hanaway—Mr. Collard and Mr. Hanaway.

Q. Did they visit you and question you during that time?

A. Mr. Kirby and Mr. Dunham were the questioners of Mrs. Behrens, and they had some business to straighten out with her. Afterwards they would visit in the cell block, and we would have conversations and discussions on certain things.

Q. Will you tell what some of those conversations were between you and the agents?

A. It was very strange, because whenever those gentlemen had left Mrs. Behrens, she would say—

The Court: (Interposing): No, no, no! Not what any third party said; just the agents.

Mr. Kronner: Did you ever tell the agents of the Government what Mrs. Behrens said?

A. We had a conversation on that. I wouldn't say Mrs. Behrens said that, but we would strike at a conversation of certain things of interest; as to hostile publicity, and sentiment, and cost of the trial, and the inquisition of the Federal Judge, and the—oh things which were in the interest of the trial, and our present state.

Q. Who did you have this conversation with, about publicity, and trial, and cost as to—charges of—

A. Oh, current things.

Q. Who did you have the conversation with?

The Court: More important—with whom did she have the conversation?

A. With Mr. Durham, and sometimes with Mr. Kirby, and whoever came to visit us. I called for Mr. Collard at the end of the first week; Mrs. Behrens was called into the office of Mr. Lehr. Mr. Babcock and Mrs. Behrens came back and—

Mr. Fordell: Just a minute! I will object.

The Court: No third party—

Q. (By Mr. Kronner): Don't tell what Mrs. Behrens said to you.

A. . . . I didn't believe what she told, so I called for Mr.—

Mr. Fordell: Just a minute! I think she is testifying to what Mrs. Behrens told her.

Mr. Kronner: Don't testify, Mrs. von Moltke, to what—to any conversation you had with Mrs. Behrens alone.

Q. May I ask you this question: Did this conversation with Mrs. Behrens take place in the presence of the agents of the Government?

A. No.

Q. All right. Did you tell any of the agents of the Government about the conversation that you had?

A. I called for Mr. Collard, and Mrs. Collard was kind enough to come over, because after what Mrs. Behrens said I was desperate.

Mr. Fordell: I am going to object to that testimony and have it stricken from the record.

Mr. Kronner: Wait just a minute. She hasn't testified to anything Mrs. Behrens said.

The Court: Yes she has. It will be stricken. Go ahead now.

Q. Did you tell Mr. Collard anything about the conversation that you had

A. I did tell him, and asked Mr. Collard—the purpose was to hear from Mr. Collard some information as to the indictment. I didn't understand that.

Q. Up to that time had anybody ever given you any advice as to the indictment at all?—

A. No.

Q. And who was Mr. Collard?

A. Mr. Collard is a member of the FBI.

Q. Now then—will you tell the conversation you had with Mr. Collard?

A. I brought my indictment to the office, and assured Mr. Collard it was—I told Mr. Collard that he has taken my statement and he knew that I never was—I didn't do those things which are called "Over" Acts, and Mr. Collard explained to me that the indictment doesn't cover the charge, and I seemed not to be able to understand, so Mr. Collard explained the indictment to me by an example which he called the "Rum Runners."

Q. Tell how he advised you and what he said.

A. This is what I understood: That if there is a group of people in a "Rum" plan who violate the law, and another person is there and the person doesn't know the people who are planning the violation and doesn't know what is going on, but still it seemed after two years this plan is carried out, in the law the man who was present becomes . . . the person nevertheless is guilty of conspiracy. And I said to Mr. Collard: "If that is the law in the United States, I don't know how I ever can prove myself innocent, and how will any judge know how am I guilty if this is the law?" Mr. Collard then told me about the Probation Department, of which I had not heard before, and he explained to me that it is the duty of this office—the Probation Department—to collect the proper data and to present it to the judge, so that the judge will know what to go by.

Q. Did you believe Mr. Collard, and did you have confidence in him?

Mr. Fordell: Just a minute! I object to self-serving conclusions.

The Court: Objection sustained.

Q. (By Mr. Kronner): Did Mr. Collard tell you or give you or say anything to you that would cause you to believe that he knew how to advise you?

Mr. Fordell: I object to that as calling for a conclusion.

The Court: She may answer. Was he a lawyer—is that what you mean?

Mr. Kronner: Yes, your Honor.

The Witness: I knew Mr. Collard was a lawyer.

The Court: How did you know?

The Witness: Mr. Collard told me so, and Mr. Collard told me that at one time—that is what I understood—he served with the Prosecutor's Office; I don't know, but I understood Assistant Prosecutor. I knew Mr. Collard has been practicing law and that he was qualified to answer my question, and that he was kind enough to do so.

Q. (By Mr. Kronner): That conversation that you just related, between you and Mr. Collard, occurred after the 21st?

A. Yes.

Q. Do you recall approximately how long after the 21st?

A. Approximately it was Monday, the 27th of September. That is what I recall. I might be mistaken.

My husband sent Mr. Okrent, an attorney, in and Mr. Okrent was accompanied by his law partner, Mr. Berger. That was September 25. Up to that time I had not seen or been visited by or communicated with my husband. I did not know whether my husband knew where I was.

Q. Did Mr. Berger or Mr. Okrent advise you in connection with the charges in the indictment, or give you any legal advice?

A. I did not ask them to advise me. I was interested in my family affairs and my children; and my husband, I had read in the paper, had disposed of his job, and I was wondering what he was doing.

Q. Was there anything said at that time as to whether they would represent you?

A. No. Mr. Berger just said my husband had asked him to see me and that he would let my husband know he would consider taking this case.

Q. Up to that time had any other attorney advised you?

A. No, sir.

Q. Were you waiting for any attorney?

A. I was, waiting for an attorney.

Q. What attorney?

A. Please?

Q. What attorney were you waiting for?

A. The attorney which Judge Moinet was going to appoint for me.

Q. Up to that time did any agents of the Government say anything to you about an attorney?

A. No, I didn't talk about attorneys.

Q. Did you discuss with the agents, during the period from the 21st to the 28th of September, your concern about your child and your husband?

A. I did.

Q. Will you tell the substance of the conversation between you and the agents on that subject?

Mr. Fordell: I would like to have her name the agents.

Q. Name the agents.

A. I talked to Mr. Dunham about it, and Mr. Dunham was very sympathetic and understanding. He was, in fact, the one who brought the Children's Aid around, that they would at least take care of and place my child finally, because the child had no home . . . taken in by a certain family who was not willing to take care of him since it was a very complicated case, and Mr. Dunham and Kirby advised Dr.—, and it was finally through Mr. Dunham's kindness that the child has been placed.

Mr. Fordell: When this take place, this arrangement for the child? Ask her.

The Witness: Until this was arranged, it was such a long process. In November, finally, Mr. Dunham succeeded.

Q. (By Mr. Kronner): Did you discuss your concern with Mr. Dunham, or any other agents?

A. I did. Mr. Dunham knows how I felt about it, and I think Mr. Collard, too, and Mr. Kirby.

Q. Did you visit the District Attorney's office on the 28th?

A. Yes. After I had this talk with Mr. Collard, I explained it to Mrs. Leonhardt, what I understood, what Mr. Collard had said to me, and on Tuesday morning, the 28th of September, Mr. Hanaway happened to be in the cell block, and I said to Mr. Hanaway: "As the matter stands, and as I understand the situation, I am supposed to plead guilty," because it was said that this would be the only possible thing; that the other people in Milan would plead guilty the next week, and that I would be willing to cooperate, but I would like to have assurance from Mr. Babcock, and that was that the publicity would be stopped right away, and that if I am sentenced I would not be sent very far away so I could keep contact with my family and know about my child, and that I never will be deported," and Mr. Hanaway said he would relay this message to Mr. Babcock, and the same afternoon Mr. Hanaway and Mr. Dunham came back and said Mr. Babcock wanted to see us—Mrs. Leonhardt and myself—and we were brought to the Federal Building and were in the bull pen in the Marshal's office. Mr. Babcock came down to that place and I said to Mr. Babcock that I understand the situation and I know that he wants me to plead guilty, so if I plead guilty I do it to cooperate. I am not guilty, but I have a child in high school and a sick child in grammar school, and that my family has to go through a terrific amount of parchment. I repeated to Mr. Babcock what you might call the conditions, and Mr. Babcock said as to the publicity there is not much he could do because there is free press, and as to the sending away, that is a matter which is to be taken up with Mr. Bennett, and he explained how one has to go about it, but said he would give reasons that they would consider this ill condition of my child and would not send me away; and as far as the deportation is concerned, Mr. Babcock did not believe that I would

have to face that because I had three American-born children and an American husband, but in the event of war he could not say what the future would have, because he didn't know whether he was in office the next year, but he was quite sure that if he was in his position, he would gladly give me a recommendation, and he was sure Mr. Lehr would do so, too, and he ended his speech by saying, "I can't help you make a decision one way or the other because that is your own—what you have to decide; I am not permitted to inform you, but I want you to keep in mind, after all, we are human." This is what Mr. Babcock said to me in the bull pen on September 28, in the afternoon. And Mr. Dunham was out to get my husband, because I hadn't seen him since September 24; and I believe Mr. Hanaway was present, but I am not sure of that.

Q. State again as to whether, as to the conversation you had with Mr. Babcock, as to whether or not you were guilty.

A. I told Mr. Babcock that I understood that I was supposed to cooperate—plead guilty—and that was a consequence of the conversation with Mrs. Behrens, but if I plead guilty, I want to cooperate and I am not pleading guilty because I am guilty.

Q. Up to that time had anybody informed you, except Mr. Collard, as to what you were charged with in the indictment? Had anybody—any lawyer—visited you up to that time, except Mr. Collard?

A. No, sir, and even Mr. Collard spoke about a conspiracy. The first time I heard about any charges and what it is called was by Dr. Levin, who is a psychiatrist in the House of Correction, who quoted my charge.

Q. When was that?

A. That was in March last year. Even Judge Moinet, as I came into the courtroom to be arraigned, I heard him say—"This other woman in the spy case"—so I did not know what my charge was.

Q. You didn't know at the time you had this conversation with Mr. Babcock on the 28th of September?

A. I did not.

Q. Well, then, what happened after you had this talk with Mr. Babcock? Did you tell him you would plead guilty?

A. I told Mr. Babcock that I would not plead guilty: that I have to think the whole situation over.

I saw my husband on that occasion. Before I went over to see Mr. Babcock I spoke to Mr. Hanaway what I wanted him to tell Mr. Babcock, and Mr. Hanaway came back in the afternoon and said Mr. Babcock would like to have a talk with Mrs. Leonhardt and myself. Mrs. Leonhardt was with me on that occasion. She went with Mr. Babcock to plead guilty.

Q. Was that the first time you saw your husband since the time you were put in the County Jail?

A. It was the first time, yes, since September the 20th—yes September the 20th.

Q. This was the 28th?

A. That was the 28th, and my husband asked me not to do anything before I see a lawyer.

Q. After your conversation with your husband, what did you tell Mr. Babcock?

A. I told Mr. Babcock that I am not ready to plead guilty. I don't know whether I told Mr. Babcock, but I let Mr. Hanaway know that. He spoke about that—that my husband said he wanted me at least to wait and see a lawyer, because he felt this was not the thing to do.

Q. Well, then, after you told Mr. Babcock that you were not ready to plead guilty, then where were you taken?

A. Back to the Wayne County jail.

Q. That was on the 28th of September?

A. That was right.

Q. And do you recall when it was you did plead guilty?

A. I pled—I changed my plea on the seventh of October.

Q. Now what happened—were you visited by any of the FBI men between the 21st and the 7th of October?

A. Yes, they came in regularly and talked to Mrs. Behrens, and afterwards visited with us, and by the end of the second week Mrs. Behrens pled guilty, and after this she told me—

Mr. Fordell: Wait a minute.

Mr. Kronner: Don't tell, unless the FBI men were there at the time.

A. They were not.

Q. Did she tell you anything that had any bearing on the plea of guilty?

A. Yes, definitely. She said—

The Court: No, no, no, no!

Mr. Kronner: Wait a minute, don't tell what she said. Did you tell any of the agents of the Government?

A. I sent for Mr. Collard and I told him what was on my mind. I asked Mr. Collard if it is true that if I don't fall in line and plead guilty, I and my husband will be involved, and Mr. Collard said he couldn't answer the question.

Q. Did you tell him who told you that?

A. I don't know. I might have said I heard—I am not certain of that, whether I said so-and-so said or whether I said I heard that such and such is the case.

Q. How did you interpret his answer at that time?

A. I asked him some more questions. I said, "Mr. Collard, could you answer whether the investigation of my husband is to be continued, or whether the FBI is satisfied? Mr. Collard said he couldn't answer that question. Then I asked Mr. Collard, "Do you think that in my statement I told the truth?" Mr. Collard said, "Mrs. von Moltke, I know—we know—you told the truth." And I asked Mr. Collard what does the FBI think—is my husband telling the truth? And he said, "Yes we know that he is telling the truth." Later on I talked to Mr. Dunham, and he said they know my husband would tell the truth whether he hurts himself, or me, or anybody else. But as to this question, I felt that there was some proof in it.

Mr. Fordell: I am going to object to how she felt, or any interpretation that is self-serving, or conclusions that she drew. I object to her testimony.

The Court: Objection sustained.

Mr. Kronner: I think it is very important—the state of mind and confusion that existed at that time—and

the great concern that she had—had a great bearing on the decision that she finally made.

The Court: She got her answer.

Mr. Kronner: She got her answer, but the way she interpreted that answer, that is important here, your Honor. I think she should be allowed to tell that.

The Court: Well, I will let her tell it. There cannot be more than one interpretation to a very simple question. All right.

Q. (By Mr. Kronner): When you asked Mr. Collard if it was true that if you did not plead guilty that your husband would be implicated, what was his answer?

A. He could not answer the question.

Q. And how did you interpret his answer?

A. I think if Mr.— I think if Mr.—

Q. Just a minute. Just state how you interpreted it at that time when he gave you that answer.

A. That there was some truth in what I heard.

The Court: What?

The Witness: (Facing Court) That there was some truth in what I heard.

Q. Did that have any bearing on the decision that you finally made?

A. I decided it would be best to plead guilty.

Q. Why.

Mr. Fordell: That is all self-serving.

The Court: Yes, that is enough on that.

Q. Up to the time that you had this conversation with Mr. Collard about whether or not your husband would be implicated, had any attorney been sent you by the Court?

A. No.

Q. Had you received any other advice as to your rights, except from Mr. Collard?

A. No.

Mr. Fordell: Well, how, your Honor, I object to these questions. They are suggestive and leading, and they also contain conclusions.

The Court: I don't recall any advice as to the rights anyone had given her. In other words, you are embodying a question that isn't in the evidence.

Q. Up to the time that you had this conversation with Mr. Collard concerning the implication of your husband if you didn't plead guilty, up to that time did any attorney advise or counsel you in any way as to the charges in the indictment?

A. No.

Q. Do you remember the date of the conversation we referred to?

A. It was between the 28th of September and the 7th of October.

Q. During that conversation you had with Mr. Collard on that occasion, did you then tell him anything more?

A. I told him that—Mr. Collard and Mr. Hanaway came in on the 7th of October, and I told them that I would go with them to plead guilty.

Q. Is that all you said to them?

A. I did not know what to do.

Mr. Fordell: I object to that statement, your Honor. It is self-serving.

The Court: All right—

Q. Did you have any further conversation with him as to whether you would plead guilty or not?

A. I said I wish I would know what the right thing is to do.

Q. Did you tell them that you were upset?

A. They saw that, that I was upset.

Q. Was there any conversation about it between you and the FBI agents?

A. Yes.

Q. Will you tell what it was?

A. They asked me whether I had seen my lawyer, and whether I had thought about what I was going to do.

Q. Who asked you that?

A. Mr. Hanaway and Mr. Collard. And I said, "I wish I would know whether that is the right thing, if I go and plead guilty." And it was said—I don't know who said this, either Mr. Collard or Mr. Hanaway—"At least it might be the wisest thing."

Q. You say that they knew that you were upset. Did they say so in so many words to you?

A. Well, I was crying, sir.

Q. Pardon?

A. I was crying, and very nervous.

Q. In their-presence?

A. Yes.

Q. And you were asking them on that occasion what you should do?

A. Well, it was not that I said "Mr. Collard" or "Mr. Hanaway, what shall I do?" It was a question if one is troubled and confused and desperate—it was more an expression, and then it was said, "Well, it might be the wisest thing," and I decided that it would be the wisest thing to go there and plead guilty.

Q. Do you remember who told you it would be the wisest thing—which Government agent told you it would be the wise thing to plead guilty?

A. I don't remember.

Q. Do you remember which agents were visiting you?

A. Yes.

Q. Who were they?

A. Mr. Collard and Mr. Hanaway.

Q. And it could have been either Mr. Collard or Mr. Hanaway?

A. It could have been either Mr. Collard or Mr. Hanaway.

Q. Did you ever, at any time during that period in your discussions about whether or not you should plead guilty or not guilty, state whether you were innocent, to the agents of the FBI?

A. Oh, yes. I talked to Mr. Collard about that. I said since Mr. Collard has taken by statement he knew I was not guilty, and he knew I never in my life lived in Grosse Pointe—one of the so-called "Over" Acts of which I and Mrs. Leonhardt was accused. I pled with Mr. Collard to do something about it, and that was where—Mr. Collard then explained . . . that this is taken care of by the Probation Department.

Q. When you refer to—when you just referred a minute ago that you were never in Grosse Pointe, what were you referring to?

A. There wasn't an "over" Act. It stated just that Miss Buchanan Dineen and I have been on such and such a street in Grosse Pointe.

Q. Was that in the indictment?

A. Yes, and I never have been Grosse Pointe, and Mr. Collard knows that.

Q. Who told him?

A. Mr. Collard knows from the statement that I never had been in Grosse Pointe.

Q. Then it was here Mr. Collard or Mr. Hanaway—it was it—they said that the wise thing to do was to plead guilty?

A. It might be the wisest thing.

Q. It might be?

A. Yes.

Q. And approximately when was that conversation?

A. While I was ready to get dressed and go; the gentlemen had called for me.

Q. Was this one of their regular calls?

A. No. After the September 28, I had said I want to think it over whether I am going to plead guilty, and Mr. Collard came in just to see how I felt about it, and whether I had seen a lawyer, because I said I wouldn't decide before I had seen a lawyer.

Q. And had you seen a lawyer?

A. I had not.

Q. All right, then tell what happened?

A. I talked to Mr. Babcock again and told him that I was ready to plead guilty, and I said again that I was doing it as I had explained on my visit before, because I still felt I was not guilty, and Mr. Babcock said that Judge Moinet was not in the house—would I mind changing my plea in front of Judge Lederle, and there a trial was going on of the Jehovah Witnesses, but it wouldn't take long, and since I was in the building, and wanted to get over with it, I said, "Yes, I will do so." So Mr. Collard came along to Judge Lederle's court, and Mr. Babcock, and we had to wait a moment until the court procedure was interrupted.

Q. State what the condition was you saw in the courtroom?

A. It was a crowded courtroom with the Jehovah Witnesses, and a crowded courtroom—

The Court (interposing): I take judicial notice that a Jehovah Witness trial always has a large crowd. (Laughter.)

Q. (By Mr. Kronner): Who accompanied you to Judge Lederle's court on that occasion?

A. Well, Mr. Collard, and Mr. Hanaway, and Md. Dunham was in the courtroom, and I believe Mr. Kirby was there, and several members of the FBI were in the courtroom.

Q. Were any of them near you when you went into the courtroom and when you went before the judge?

A. To my right stood Mr. Babcock and to my left stood Mr. Collard.

Q. And where were the other agents?

A. They was standing at the end of the bench to the—close to the wall.

Q. Facing you?

A. Yes, I could see the gentlemen.

Q. Now, then, tell what happened when the Jehovah Witness case was interrupted, and what occurred from there—from that time on.

A. I went in front of Judge Lederle, and Mr. Babcock handed the judge what I would call a folder, and Judge Lederle looked into that and said he could not accept the change of plead because there was something about an attorney—either I did not understand what he said—but I understood that he said there was to be appointed an attorney in this case, or there was appointed an attorney in this case, or there was to be present an attorney—but I knew distinctly the judge said he could not accept the change of the plead, and Mr. Babcock explained to him that this was different, and that he could accept the change of the plead, and I was handed a note, and it was said, to my knowledge and my recollection, it was said I was supposed to appear for trial in court, and that was what I didn't want at all, so I called Mr. Babcock's attention to that.

Q. Pardon me. When you say there was a paper handed to you, who handed it to you?

A. I don't know sir. I was so confused in the midst of the Jehovah Witnesses that I can't recall who handed the paper or what was said distinctly.

Q. Up to that time, had the judge talked to you, or had all the conversation between the judge and anybody been between him and Mr. Babcock?

A. And Mr. Babcock, yes.

Q. There was handed you a slip of paper?

A. Yes.

Q. And to the best of your recollection, did you read that paper?

A. I tried to read it.

Q. To the best of your recollection, do you know what was on that paper?

A. It said something about—to my recollection—that I was to appear for trial whenever I was wanted, and I called Mr. Babcock's attention to that and said I wouldn't sign this note because I did not want a trial. Mr. Babcock said this is all right; I could sign it; and I signed the slip.

Q. Was that, to the best of your recollection, the entire conversation between you and anybody in the courtroom that day about this paper that you signed?

A. Yes, sir.

Q. Then what hapuened after you signed that paper?

A. Well, Judge Lederle spoke to me and he said—I can remember that he said, "Has the indictment been explained to you?"

Q. All right. He asked you that question?

A. Yes.

Q. And had the indictment been explained to you?

A. Well, Mr. Collard told me—

The Court (interposing): Another question is what did she reply?

Mr. Kronner: All right. I was leading up to that point.

The Court: Let's get that, because the judge can only act upon what is told him about it. He asked you if the indictment had been explained to you, is that right?

The Witness: Yes, your Honor.

The Court: What did you say?

The Witness: I said, "Yes."

Q. (By Mr. Kronner): Now, then, I ask you, had it been explained to you?

A. No, it had not been fully explained to me.

The Court: Well, you read it, didn't you? You seemed to remember about various paragraphs that cover the Overt Acts, and described them as "Over" Acts. You had read it, had you not?

The Witness: I had, your Honor.

The Court: All right.

Q. (By Mr. Kronner): Was there any further conversation between you and the Court?

A. Judge Lederle said, "And you plead guilty because you feel you are guilty?" And I said, "Yes."

Q. At the time that you gave that answer, was it true that you were pleading guilty because you knew you were guilty?

A. It was not, because I pled guilty to cooperate.

Q. At the time that you were pleading guilty, did you even know what you were pleading guilty to?

A. No, I did not, because Mr. Collard explained to me that the "Over" Acts in the Indictment do not mean the real thing.

Q. From your reading of the so-called Overt Act, would you know from a reading of them what you were charged with?

Mr. Fordell: I object to these questions, your Honor, because they call for self-serving answers.

The Court: Well, in that form it is objectionable.

Mr. Kronner: Your Honor, please—

The Court: Don't argue about it. Instead of asking would she know, ask her did she know. That question is all right.

Q. (By Mr. Kronner): Did you know, Mrs. von Moltke, what the charges against you were, from a reading of the indictment?

A. You mean what the accusation was?

Q. Yes.

A. I knew I never had been in Grosse Pointe.

Mr. Fordell: That is not responsive to the question.

The Court: When you refer to that fact—you knew you were not in Grosse Pointe,—why did you say that, why did you give that answer?

The Witness: Because what I read in the accusations, I felt I was not guilty of it, and I talked this over with Mr. Collard, because Mr. Collard took my statement, and he knew that I had told the truth and that I was not guilty of the "Over" Acts.

Q. (By Mr. Kronner): At that time how did you pronounce Overt Acts?

A. Overt Acts.

Q. Overt Acts?

The Court: Her pronunciation is very good! In fact the indictment so labels it—"Overt Acts"—set out in—

Q. (By Mr. Kronner): How do you spell Overt Acts?

A. (Pronouncing): "Over" and "Acts".

The Court: You are pretty near right—five letters and one wrong—"t"—that's a good percentage. Go ahead.

Q. (By Mr. Kronner): At that time, Mrs. von Moltke, that is, the time that—leading up to October 7th or 8th, when you appeared before Judge Lederle, tell the Court whether you had, at that time, back in 1943, a good knowledge of the English language.

(Mr. Fordell rises as if to object.)

The Court: She may answer.

The Witness: I think that Mr. Collard and Mr. Hanaway—

The Court (interposing): No, no. Answer the question.

The Witness: I believe that I had a hard time to understand—

Mr. Fordell: I object.

The Court: That answer may be stricken. The question is: Did you have a good knowledge of the English language at that time?

The Witness: No.

Q. (By Mr. Kronner): Well, will you tell the Court how limited your knowledge of English was at that time? Explain that fully to the Court.

A. Would you repeat the question so I can understand what—

Q. Will you explain to the Court how restricted, or limited, your knowledge of English—of the English language—was at that time, that is, between August 24, 1943, and October 7, 1943?

A. I had not enough practice in English, because at home we spoke only German, and I gained my knowledge from reading, on the radio, and I thought I could carry on a conversation. Of course, I have a vocabulary which is misleading; there are things to which I am bound to attach a wrong meaning. For instance, we had once a discussion, and I made the statement that the Probation Department is a mercenary agency. Six months later I found out what I meant it was an agency of mercy, and that a mercenary agency is quite a different thing.

Q. Can you think of any other words you did not know the meaning of, that were important at that time?

Mr. Fordell: Your Honor, object to that question. It is going too far, to pick out some word in her vocabulary that she didn't—in the English language—that she couldn't understand. It is too remote. I don't know what it proves.

The Court: You mean there are a lot of words in the English language you and I don't understand.

Mr. Fordell: That is true.

The Court: Did you know any English before you came to this country?

The Witness: No, your Honor.

The Court: You came here in 1930?

The Witness: No, in 1927.

The Court: So you had been here sixteen years at that time?

The Witness: Yes, your Honor.

The Court: I see.

Q. (By Mr. Kronner): Were there any words in the indictment, or any words in any of the statements that you gave the agents of the Government, that were misunderstood by you?

A. There might have been quite a number of words, because I am in the habit—

The Court: One moment! You may not speculate if you don't know what they were.

Q. (By Mr. Kronner): Can you recall any discussion that you had with any of the agents, as to words that you did not understand?

A. Well, the very word "agent" in our conversation was misleading to me; as to the German way it is pronounced "a-gent" (pronouncing the "g" as in "go"), and it gets a character from the noun attached to it; you know what I mean—"agent" doesn't mean anything, but a man who sells insurance is an insurance agent; a man who works as a social worker is a welfare agent, and a man who is called in American a producer, is a theatrical agent, so that is one word very misleading to me.

Q. Did you have any discussion with any of the Government agents as to your misunderstanding of the word "agent"?

A. I had, with Mr. Collard in Mr. Lehr's office on March 17, it was, and before with Mr. Hanaway in Wayne County Jail.

Q. Will you tell what that discussion was?

A. It is in my statement, and it is said—it was taken down as I had said that between November 1st and December 20. Mrs. Behrens told me that Grace Buchanan Dineen was an agent for the Axis Power, and this particular agent came up in one conversation when Mr. Dunham and Mr. Hanaway were in Wayne County Jail. Then I ask Mr.—I knew then that I did not, I had not understood fully the meaning to the word, and I talked about it to Mr. Collard, and Mr. Collard knew that I had a very hard time with rephrasing my statement; it took a lot of patience to get the thought I want to express; I am still in the habit of thinking in German and translating into the English. This is what makes it difficult, though in thirty-one months incarceration I had considerable time to improve my English and learn a great deal about the language.

Q. That is since your plea of guilty, is that right?

A. That is since my plea of guilty.

Q. During this discussion you had about this word "agent" in connection with Mrs. Dineen, did you have a conversation with Mr. Lehr?

A. In Mr. Lehr's office, with Mr. Collard.

Q. Had you had a conversation with any of the FBI men before that?

A. It seems to me it was in October, with Mr. Dunham and Mr. Hanaway, as Mr. Hanaway was the last time in Wayne County Jail.

Q. Did you try to explain to them that you did not understand the meaning of that phrase, that you knew that Mrs. Dineen was an agent?

A. Yes.

Mr. Fordell: Just a minute. Is this after the plea of guilty had been entered?

Mr. Kronner: No, this is before and after, as showing that she did not have—there were many words like “conspiracy,” “agent,”—

Mr. Fordell: I meant to ask, did she talk to Mr. Lehr before she entered a plea of guilty?

The Witness: No.

Mr. Fordell: Then the testimony she is giving as to what she told Mr. Lehr was subsequent to the time of the plea of guilty?

Mr. Kronner: That's right.

Mr. Fordell: I object to it.

The Court: It couldn't affect the plea.

Mr. Kronner: It couldn't affect the plea, but she had this conversation first with the FBI agent.

The Court: She testified to that.

Mr. Kronner: It is just to bring out that she didn't understand the meaning of that word, which was very important, and had she had the assistance of counsel to advise her, she probably wouldn't have changed her plea.

Q. (By Mr. Kronner): Well, then, tell further what happened in Judge Lederle's courtroom?

A. Judge Lederle accepted the plea, and said that he saw this in the newspaper . . . that I would be referred to the Probation Department. I was then taken to the Wayne County Jail.

Q. Did you have any further conversation with the agents of the FBI after your appearance before Judge Lederle?

A. Yes. They came regularly to visit us.

Q. Did you have a conversation shortly after your

plea of guilty before Judge Lederle, with any of the FBI agents?

A. Yes. I said even then, the right thing—I should not have pled guilty.

Q. To whom did you say that?

A. Mr. Dunham and Mr. Kirby.

Q. Did you tell them why you had done the wrong thing in pleading guilty?

A. Yes. Because I am not guilty.

Q. Did you tell them that you wanted to change your plea?

A. I did not know, sir, that this was permissible.

Q. Did you ever learn that it was permissible?

A. Around Christmas I learned that this was permissible.

Q. What else did you learn around Christmas?

Mr. Fordell: I object to that question. She might have learned a lot of other things which have nothing to do with this case.

Mr. Kronner: It has a lot to do with this case.

The Court: All right. What was the question?

The Court: —in connection with your plea of guilty?

The Witness: I learned that in the United States, under the Constitution, as a defendant you do not have to prove yourself innocent as in the European countries; that it is the task of the prosecuting attorney to prove you guilty. I learned farther that after you have pled guilty you never can appeal your case, and I understood first that if I would plead guilty and I would be sentenced, that I would have the right, if I would have the money, to appeal the case, but I learned then that this was not so.

Q. From whom did you learn that?

A. Mr. Okrent.

Q. When was it you found that out?

A. Shortly after Christmas.

Q. Had you known that when you appeared before Judge Lederle, would you have pled guilty?

Mr. Fordell: Just a minute. I object. That is absolutely self-serving.

The Court: Objection sustained.

Mr. Kronner: Your Honor, please, I think we have a right to this. It goes to the very heart of this proceeding, your Honor, to find out what was the state of her mind as a result of not having counsel.

The Court: Yes, she may confirm the condition of her mind and what influenced her. Proceed along that line.

Mr. Kronner: Your Honor, I am now asking her, if she had known prior to the time she entered her plea of guilty, that there was this presumption of innocence, had she been informed of that, would she have pled guilty?

Mr. Fordell: Your Honor, that wouldn't have any bearing on the issue—the mere fact that she found out later that it might have been tough for the Government to prove the case doesn't establish that she didn't enter her plea intelligently. The only issue is: Did she know she was pleading guilty? If she did, and did it understandingly, intelligently, and voluntarily, without any promises of any kind, or threats, then I believe the plea would have to stand, even though she might have found out later that it would be tough for the Government to prove the case, and had she known that, she wouldn't have pled guilty.

Mr. Kronner: Your Honor, please, it is all so necessary a question in this case as to whether or not she was informed and had knowledge of her rights.

The Court: Before she pled?

Mr. Kronner: Before she pled. And it is necessary that she had the capacity to understand what her rights were.

The Court: Is there any testimony that she was informed that she had to prove her innocence?

Mr. Kronner: Yes, your Honor.

The Court: None whatever.

Mr. Kronner: I think the testimony, your Honor, the conversation at the time—

The Court (interposing): The only testimony to that effect is her testimony a moment ago on how, but no evidence of anyone connected with this case, that said she would have to prove her innocence.

Did any government official tell you you had to prove your innocence?

The Witness: No.

Q. (By Mr. Kronner): Mrs. von Moltke, do you recall the occasion when Mr. Collard read over the indictment to you?

A. Yes.

Q. You sent for him?

A. I did.

Q. And asked him to explain it to you?

A. Yes.

Q. Now, then, tell what advice he gave you at that time.

Mr. Fordell: I object to it.

The Court: Objection^s sustained.

Q. (By Mr. Kronner): Did he give you any advice at that time?

A. Yes. Mr. Collard tried to make me understand—

Mr. Fordell (interposing): I object to that answer, your Honor.

Mr. Kronner: If the Court please, she hasn't finished her answer.

The Court: Go ahead.

The Witness: After I thought I understood what Mr. Collard said by explaining the Rum Runners case, I said, "Then I have no chance to prove myself innocent?"

Q. (By Mr. Kronner): And what did he say?

A. Mr. Kronner didn't say anything. Then I said, "How will any judge know how to judge me like that, if one is innocent, and if the law is such and such?" And Mr. Collard told me about the Probation Department.

Q. (By Mr. Kronner): Will you tell the conversation between Mr. Collard and you on the occasion when he went over and read the indictment to you; tell everything you heard that was said.

A. I read the indictment, and I took it to the office. I told Mr. Collard, I said, "Say, Mr. Collard, you know. I have nothing to do with all the people named here." And then he pointed out what he called the "Over" Acts, and I said, "You know from my statement. I am not guilty of all this."

The Court: —not guilty of all this?

The Witness: Yes.

The Court: But you were guilty of some of the Overt Acts, weren't you?

The Witness: No, your Honor.

The Court: I just glanced over here—Act 24, you are mentioned in it, and I saw one or two other places where you are mentioned. I never read this indictment before, but I know at least two places—24, 32—

Mr. Fordell: 29, 30—

The Court: Yes, I know there are a number in which you are mentioned. Did you notice you were mentioned in several of these Overt Acts charged?

The Witness: Yes.

The Court: All right, because you just referred specifically to one which describes something that occurred in Grosse Pointe; you said you weren't there; but there were quite a number of other Overt Acts charged in which your name was mentioned—that is true, isn't it?

The Witness: That my name was listed. But I am not guilty of it, and this is what I talked to Mr. Collard about, because, I said, "You have taken my statement, and you know it is not so." And then Mr. Collard explained that the indictment in this connection doesn't mean much of anything, and that the point Mr. Collard brought out was in sequence of a conversation which was among the women who after Miss Behrens had seen Mr. Babcock. For this very reason I wanted to see Mr. Collard and ask him questions, and Mr. Collard then explained; and I couldn't understand anything because I knew I was not guilty, and I told him so, and he said, "Nevertheless—" and explained with the "Rum Running" examination.

Mr. Kronner: For example, Mrs. von Motke, I will read you one of the claimed Overt Acts.

The Court: What are you reading?

Mr. Kronner: 29—page 10.

The Court: Yes.

Mr. Kronner (reading): "... Marianna von Moltke introduced Edward Abt to Grace Buchanan-Deneen."

Q. Were you there on that occasion?

A. I was in the house on this occasion, but I did not introduced Mr. Abt to Miss Buchanan Deneen.

Mr. Kronner (reading): "... Marianna von Moltke met and conferred with Grace Deneen."

Q. Did you know anything about any conspiracy?

A. I did not.

Q. Did you understand that merely meeting a person, and talking to them, whether that was lawful or unlawful?

Mr. Fordell: I object to that, your Honor. That is self-serving.

Mr. Kronner: If the Court please, many statements that the witness makes are self-serving, but she must serve herself with what she knows about the charges—or capacity to react to them, and I don't think self-serving statements should necessarily be excluded.

The Court: It isn't necessary to exclude it. In fact, there have been innumerable statements of that character admitted. She may answer.

Q. (By Mr. Kronner): Did you understand from reading this Overt Act that the fact that you talked to Mrs. Deneen at your house, there was anything unlawful about that?

Mr. Fordell: I object to that, your Honor.

The Court: That isn't a statement of what the facts are. Mere talking is nothing unlawful, but the conferring or meeting with the object of conspiracy, that is unlawful. They might talk for twenty-four hours—innocent conversation—so your statement isn't right.

Mr. Kronner: Your Honor, she just testified, she said she never knew of any conspiracy.

The Court: Her statement isn't a direct statement. You are leading her on. This casual meeting or talking may be unlawful. It may be, but it depends upon the circumstances behind the character of the meeting.

Q. (By Mr. Kronner) Now, then, Mrs. von Moltke, how did Mr. Collard explain to you as to the nature of these charges? Did he attempt to explain just what these charges did mean?

A. No. Mr. Collard said that those charges don't mean a thing, and then he explained to make me see the

Rum Runners' case. I told him, "Mr. Collard, you know I never introduced Mr. Abt to Mrs. Dennen." Then he explained the Rum Runners' case, and it gave me the idea that if such is the law in the United States, you can't do anything about it.

Q. Just to make clear, what did he explain to you about the Rum Runners?

The Court: I think she told that. I remember, and I am the only one who really should remember.

Q. (By Mr. Kronner) From that, did you understand that you had to prove your innocence?

A. Yes.

Mr. Fordell: Just a minute! I object to that as suggestive and leading. It gives just the answer he expects the witness to give.

The Court: Certainly it does, but as I said—

Q. (By Mr. Kronner) When was it that you first found out that a person accused of crime is presumed to be innocent?

The Court: That has been answered before.

Mr. Kronner: All right.

Q. (By Mr. Kronner) And had you known that before you pled guilty, would you have plead guilty?

Mr. Fordell: I object to that, your Honor. There is no way of meeting this testimony. It is all something objective in her mind. She doesn't accuse anybody, she doesn't accuse any of the agents—she is testifying to what was in her own mind.

Mr. Kronner: She has a right to testify, your Honor, as to the result of her demanding the assistance of counsel.

The Court: All right. The answer is obvious. (To stenographer): You got the question?

(Whereupon the last question was read by the reporter.)

A. I first found that out on January—Monday, January 17, from Mr. Dunham. Mr. Dunham came up and we had a conversation on that. Mr. Dunham said it is true that in the United States, under the Constitution, nobody is guilty until he has been proven guilty. That

was the first time that I talked to Mr. Dunham about it. I asked again for Mr. Collard, to inform me whether this is my right; whether people who plead guilty are permitted in America to withdraw their plea. This was on January 6. After this we had several conversations. Mr. Dunham, on January 17, answered my question by saying that under the American Constitution nobody is guilty until he has been proven guilty.

Q. Can you tell any other things that happened—any other conversations between you and the FBI, or any other Government agents, that influenced you, or caused you to plead guilty when you knew you were innocent?

A. Well, during the time between the 23rd, I might say, and the 28th, there were many discussions between Mrs. Behrens and the gentlemen from the FBI, and many things were said in the conversation.

Mr. Fordell: To whom? I would like to know to whom, who made the statements—to whom were the statements made, and when?

The Witness: There were no statements made. I am talking about discussions and conversations.

The Court: Nevertheless, we want to know who was doing the discussing—who was present?

The Witness: In this discussion was probably Mr. Dunham, Mr. Kirby, and Mrs. Leonhardt, and Mrs. Behrens and I, and we were discussing things, and the answers had the effect which were given.

Mr. Fordell: I object to her testimony of what the effect of the answers were.

The Court: There must be some possibilities of controverting testimony when you are talking to a large party; you can't say who talked, particularly when the witness is testifying not to facts, but her impressions and conclusions. It is clearly permissible.

Q. (By Mr. Kronner) Mrs. von Moltke, you are now relying on conversations, as I understand it, or discussions, that took place between you, Mr. Dunham, and Mr. Kirby, and in the presence of Mrs. Leonhardt and—

A. Mrs. Behrens.

Q. Behrens? Will you tell whether anything was said

by you to the FBI agents, and to those there? What was said on that occasion?

A. We were discussing the fact that—

The Court: (Interposing) Now, first say to whom who said the discussion that was had.

The Witness: Mrs. Behrens said—

The Court: To whom?

The Witness: To Mr. Dunham, Mr. Kirby, Mrs. Leonhardt, and myself. She said, for instance, there is a statement in case, and we had a discussion on that.

The Court: Well, that is not very illuminating.

The Witness: And it was said of everything pertaining to the case—the gentlemen were visiting us, and—

Mr. Kronner: Well, tell what they said, or what was said in the presence of these men, in your presence, that caused you to plead guilty when you knew you were not guilty.

The Witness: The expense of the trial, the term of probation, and the—

The Court: Now, did any of the agents, or did you, or did the other alleged conspirators say it? If the agent said it, who was it?

The Witness: Yes, in a discussion.

The Court: All right. Who was it?

The Witness: Well, for instance, if Mrs. Behrens—

The Court: Not for instance. Who said it, of the agents?

The Witness: Mrs. Behrens would say—

The Court: I am not interested in what she said.

Mr. Kronner: Who was there when she said it?

The Court: I am not interested in that. I am interested in what the agents said that influenced the petition.

The Witness: Could you please repeat the question?

Mr. Kronner: State what occurred.

The Court: My question—we might have the reporter read it. (Before reporter spots desired question, the Court continues): All right. Let it go. Put it this way—I will explain: What you said, or what the other woman said, isn't at this moment of any importance. What counsel is endeavoring to do is to show that you were unduly or improperly instructed by something that the agent of the

FBI said. Now that is what I want to know: What did any of these agents of the FBI say at that time you said you had this discussion?

The Witness: Well, your Honor, may I explain?

The Court: Isn't that a simple question?

The Witness: Yes, but I want to say what is the truth. You know, I am here to tell the truth. You have a conversation; somebody makes a remark; and you take the essence of the thought.

The Court: Yes, that is all very true, and that may have been the exact condition, but when you are charging, as you are at this time, that the agents of the FBI influenced you by their actions, by their words, to do a certain thing, you must tell what they did, what they said, and who they were. In other words, the law gives a person a chance to refute things that are said. If you speak generally, without any specific thing said, without a name mentioned, if it be not true, how can anyone refute it? You see the reason for it?

The Witness: I do.

The Court: All right, then, bear that in mind and try to answer the question.

(Silence.)

Mr. Kronner: Will you go ahead and answer?

The Witness: Yes, if you start the question.

The Court: If you what?!

Mr. Kronner: Repeat the question.

The Court (to stenographer): Read the question.

(Whereupon the Court's last question was read by the reporter.)

The Court: Do you understand that, Mrs. von Moltke? (Silence.) She told me she did. Can you explain it more definitely, or better?

Mr. Kronner: No, but she seems to be confused.

The Court: All right. I was endeavoring to give the witness a reason why certain things had to be done in a certain way. Whether they percolate or not, the question is: What did these agents of the FBI say or do that influenced your judgment. When did they say it, and who said it?

The Witness: I am trying to frame an answer to that comprehensively.

The Court: Beg pardon?

The Witness: I am trying to give an answer to that.

The Court: You tried?

The Witness: No, I am trying to.

The Court: All right.

The Witness: After Mrs. Behrens saw Mr. Babcock and Mr. Lehr, she would come back and tell certain things. In the discussion then, if the agents came, we would strike the same thing and discuss that, and the answers which were given then in the discussion I took as being told what is what. Now, for instance, if Mrs. Behrens came and said that Mr. Babcock had said that—

The Court: One moment. Was it what this other woman said that someone else said that influenced you?

The Witness: Well, no, your Honor.

The Court: That is what you are repeating now.

The Witness: Yes, but the—we would ask in the discussion—may I explain that?

The Court: I am hopefully waiting for the explanation.

Mr. Kronner: I believe, your Honor, if I may interrupt, I believe she is trying to tell you that Mrs. Behrens would return from—

The Court: I understand that clearly.

Mr. Kronner: All right. Then Mrs. Behrens made a statement that was purported to have been made by Mr. Lehr.

The Court: I understand that. I think I understand her quite as well as you do.

Mr. Kronner: And now she is trying to say that she asked the FBI to explain—

The Court: And I am asking her what she asked them, what they said, who said it, and when they said it?

The Witness: Then I would say, "Is it really so bad, that the public is so hostile?"

The Court: To whom?

The Witness: Mr. Dunham. "... if we go to Court, will we be bodily attacked?" Mr. Dunham would say, "it is war time—you have to bear that in mind. Public sen-

timent grows from war hysteria. You don't need to be afraid; you will be protected."

The Court: That you will be protected?

The Witness: That I will be protected by the FBI. But they left me with the thought that it is terrible to go to court and face a hostile public.

The Court: It is always terrible to go to court. We will adjourn now. We will have an evening session; be back at seven o'clock.

(At 4:40 P.M. an adjournment was taken until 7:00 P.M. the same day.)

(Court met pursuant to recess.)

Direct Examination (Continued)

By Mr. Kronner:

Q. Mrs. von Moltke, I believe that you were last discussing that you had a conversation with the members of the FBI when they said they would protect you. Do you remember that?

A. Yes.

Q. And do you remember what the names of the FBI were with whom you had this discussion?

A. Well, those men who were there, Mr. Kronner; it was such a long time ago that I cannot very well remember the names exactly, and at this time I was so confused and even though—

The Court: Well, that is the answer, that she does not remember.

Q. Do you remember any specific occasion when you were in the County Jail that you discussed or had a discussion with the FBI men concerning any protection that they would give you?

A. Well, that was on the occasion where we discussed the court procedure with all the publicity and all the newspapers that would come to the court and all that, would see the people involved, and this was more or less a spectacle to the public, and that the public was very

hostile, it was to be understood in wartime, and the case itself would receive so much publicity.

Q. All right. Now, where did that discussion take place

A. In the cell block, 602, in the Wayne County jail.

Q. To the best of your recollection who was there when that discussion took place?

A. Probably Mr. Dunham and Mr. Kirby.

Q. And can you recall what either Mr. Dunham or Mr. Kirby said about the public being hostile?

A. No, I cannot recall any quotation on that.

Q. Well, in substance, to the best of your recollection?

A. In the substance that the public was naturally hostile to people like that since there was a war on and the public sentiment was very high on that, and that naturally we would have to face, if we got on trial, we would have to face a hostile public.

Q. Did anyone of the FBI men tell you whether they would protect you or not?

A. Mr. Dunham said that he would protect me. It was more he—what would you say? That I would say well then if they were attacking me and Mr. Dunham would say "You do not need to be afraid of that, because we will protect you,—Bert Collard, he and I get in the back, and suggest a way."

Mr. Collard was not there then. Mr. Collard had been there several times. This conversation took place between the 23rd and the 28th, when we had all those conversations. There had been no conversation between me and the FBI agents concerning the non-appearance of the promised attorney.

Q. Did the FBI, any of the FBI men who visited you there during that period, did they ever make any remarks as to whether the attorney had visited you or not?

A. They asked me whether I had seen my attorney.

Q. And what did you tell them?

A. No.

Q. And did they make any comment about that?

A. No, the FBI men did not make any comment.

Q. Was there any discussion during that time be-

tween you and the FBI, or any remarks by the FBI as to whether the other defendants in that case were pleading guilty?

A. Yes, there was.

Q. Will you state what that conversation was?

A. Mr. Kirby had a conversation with Mrs. Behrens.

Q. In your presence?

A. Yes, where he said that he had been in Milan and that next week the people would plead guilty. That was what I understood from the conversation between Mr. Kirby and Mrs. Behrens.

Q. Do you remember when that conversation occurred?

A. It was after Mrs. Behrens pled guilty in this time. I believe it was. It was between the 28th and the 7th of October.

Q. Did you have any discussion about that with Mr. Kirby?

A. I asked Mr. Kirby once if all the people would plead guilty, and I not, would I get a trial for myself.

Q. And what did he reply?

A. Mr. Kirby said that he could not answer this question because he did not know if this would be all right with the prosecuting attorney.

Q. Did he tell you that you should get an attorney to advise you on that?

A. No, Mr. Kirby did not tell me such a thing.

Q. Whenever you asked any FBI men who visited you there during that period between the 21st of September, and the 7th of October, whenever you asked any of them for any advice did any of them at any time tell you that you should get your advice from an attorney?

A. No, they did not.

Q. When you read the indictment, and it referred to overt acts, did you understand what was meant by "Overt Acts"?

A. I did not.

Q. Do you know what "overt" means?

A. I do not.

Q. Up to this moment do you know?

A. Up to this moment I do not. I am not familiar in any way or form with the legal terminology.

Q. On the second page of the indictment there is language to the effect that to violate Section 32 of Title 50 USC,—do you know what “USC” mean?

A. No, sir.

Mr. Fordell: Well, just a minute. I object. I do not think it is proper testimony.

The Court: It is not. I do not suppose there are two people in the room who would know, including counsel. It is a citation from the Code, but obviously she would not know.

Mr. Kronner: Well, your Honor, it is claimed that she violates USC, Section so and so, I think it is—

The Court: When they are explaining to a defendant in court here, they give the substance of the crime charged. They do not cite the number and the subdivision, because it would be nothing to them, unless they had memorized the entire United States Code, which I do not think anybody has. Lawyers have not. Do not ask obvious questions like that. Of course she did not know. I dare say if you read it for the first time you would not know, and you probably do not know now.

Mr. Kronner: I know it, because I looked it up, your Honor, but I would not have known it if I had read it—

The Court: That is the reason. Go ahead.

Q. (By Mr. Kronner): Earlier in your testimony today, Mrs. von Moltke, you testified as to a conversation between you and Mr. Collard as to whether or not you knew that Mrs. Deneen was an agent of the Axis Powers. Do you remember that?

A. I do.

Q. And I believe you stated that you did not know at that time the meaning of the word “agent”. Is that right?

A. Not in the combination it has the value or character concerning the case.

Q. Did you ever know whether Mrs. Deneen was an agent of the Axis Powers?

A. I did not.

Mr. Fordell: Just a minute. I object to that. It is not material to the issue here.

The Court: The objection is sustained.

Q. (By Mr. Kronner): Did you ever have a conversation with Mr. Collard about that?

Mr. Fordell: I object to it, as it is not material in this case.

The Court: The objection is sustained.

Q. From the time that you were handed the indictment to the time that you pled guilty on October 7, did you know the meaning of the word "conspiracy"?

A. I did not.

Q. Did you know the difference between conspiring and confederating?

A. I did not.

Mr. Fordell: Your Honor, I still say that this testimony is not material to the issue in this case, and I object to it, your Honor.

The Court: I will let that stand. What do you call a conspirator in German?

Mr. Kronner: The judge is addressing you.

The Court: What do you call a conspirator in German?

A. I don't know, your Honor.

The Court: What do you call a conspirator in German?

A. I would not say so, your Honor; but I don't know what you would call them.

The Court: Plotter; have you ever heard that word, plotter?

A. No.

Q. Do you know what a plot is?

A. How do you spell that, your Honor?

The Court: P-l-o-t. Plot.

A. Oh, a plotter. No, there is no German word either.

Q. Do no German plays have plots?

A. Yes, but they do not call it a plot.

The Court: What do they call it?

A. I could not—I cannot remember.

Q. Conspiracy is not a new word, you know; even the Greeks have a word for it.

Q. (By Mr. Kronner): Did you know what a grand jury was at that time?

A. I did not.

Mr. Fordell: I still object to this testimony.

The Court: Objection sustained.

Q. You testified at the hearing before the Enemy Alien Board, I believe, on the first of September, was it, at 10 o'clock? Was that 10 o'clock in the morning, or 10 o'clock at night?

A. It was 10 o'clock at night.

Mr. Fordell: I object to this testimony as it is not material to the issue as to what time she testified.

The Court: It certainly is not.

Q. On the occasion when Mr. Okrent and Mr. Berger visited you on the 25th of September, at the County Jail, what was the substance of your conversation?

A. The substance of our conversation was between myself and Mr. Okrent about my family, about my husband and my child especially.

Q. Did you discuss the case?

A. I did not.

Q. Did they advise you as to your rights in any way?

A. They did not.

Mr. Fordell: We have gone over this once before.

The Court: I think we have.

Q. (By Mr. Kronner): You have testified that up to the time of your arrest on the 24th of August, 1943, that you were a housewife and a mother.

A. I was.

Q. Would you kindly tell what your duties, and what you did as such?

Mr. Fordell: I object to it. It certainly is not material in this case as to what she did as a housewife, if she washed dishes, or clothes, or had a maid, on one day, or played golf. I certainly think it is far away from the issue in this case.

The Court: Yes, it is. We ordinarily know what the accepted duties of a housewife are. I assume you want to show some exceptional circumstances, do you?

Mr. Kronner: Your Honor please, I presume I was trying to show, first of all I might state this, that one of the important factors in the determination of a person's—of the effect of the denial of counsel and as to

whether a person had the capacity and the understanding to waive counsel, to make an intelligent choice, one of the important factors in the determination of that is their background, their past life, and what I am attempting to show is the kind of a life, restricted life,—I don't know what it is yet—that she lived up to the time of her arrest, and then this sudden unexpected transition into an entirely different thing and the effect that that had on a person who had lived that kind of a life before, and the effect particularly that she was not—

The Court (interposing): Well, all right. Your theory is all right, but do not go into unnecessary details. She was a housewife. Now we all know what the ordinary duties of a housewife were. If she had no other activities, no other avocation, no social life, no cultural life, bring those things out. We do not care whether she washed dishes, or scrubbed the floor, or did anything else like an ordinary housewife would do. It is like asking a bus driver what he does.

Q. (By Mr. Kronner): Mrs. von Moltke, will you state what activities, if any, that you had outside of your home, social activities, if any.

A. I was a member of the Red Cross, and I was a member of the PTA, the Parent Teachers Association. And I was honorary social worker, voluntary social work, with the International Center, YWCA.

Q. Were you very active in that work, in that social work?

A. Not very, because I had a sick child I had to attend to mainly.

Q. And that was the extent of your social activities or your activities outside of your home?

A. Yes, sir.

Mr. Fordell: Those questions are certainly suggestive "That was the extent of your—" certainly it suggests the answer to the witness, and the witness gives you just the answer you want.

The Court: Even Mr. Kronner would not deny it. But go ahead, Mr. Kronner. I do not want to stay too many nights here.

Q. (By Mr. Kronner): Did you have any other social work that you did, if you recall?

A. What am I to understand by "social work"? You mean for the welfare of the people in general?

Q. Yes.

A. I rationed gas, and sugar, and helped out on those things where volunteer workers were called in, if that is what you mean, sir.

Q. And do you recall any other similar activities that you were engaged in, or that you took part in, any other social work of any kind?

A. No, that was all I could take care of.

Q. Do you recall of having done any work at the asylum at Ypsilanti?

A. Yes, this was in connection with the International Center.

Q. Did you go to Ypsilanti?

A. Yes, in Ypsilanti.

Q. What did you do there?

A. There would be mentally deranged people, and saw to it—contacted the social worker on the case to help them out, and their family,—to help their families out.

Q. Can you think of any other activities, social activities of a like kind besides the Red Cross, and the Parent Teachers, and the Social Center?

A. Not at the present.

Q. Did you belong to any political organizations?

A. I did not.

Q. Any social organizations?

A. The only membership I ever carried was the American Red Cross.

Mr. Kronner: That is all.

Cross Examination

By Mr. Fordell:

Q. Mrs. von Moltke, when you were served with the indictment in this case, did you read it?

A. I read it.

Q. And after you had read the indictment, did you feel you were innocent of the charges that were stated in the indictment?

A. Yes, sir, definitely so.

Q. You did not feel you were guilty of those charges that you read in the indictment?

A. I did not feel guilty of those charges in the indictment.

Q. Then you knew what the charges were in the indictment.

A. Oh, no, and so far I might explain that to you, I knew—

Q. Just answer my question.

The Court: Answer the question.

A. Yes, I knew, not what the charges were, but I knew as I said before that I saw I was accused of something of which I was not guilty. That was how I understood that.

Q. Well, you read the indictment. Isn't that right?

A. I read the indictment.

Q. And you felt you were innocent of the charges that were described in that indictment?

A. And the overt acts.

Q. And the overt acts?

A. Yes.

Q. Do you recall how many overt acts you read in that indictment, approximately?

A. Five.

Q. Now, after you talked to Mr. Collard, did you still feel you were innocent of those charges?

A. Yes, sir, because I told Mr. Collard so.

Q. After Mr. Collard had explained the indictment to you, did you still feel you were innocent of the charges described in the indictment?

A. I told Mr. Collard so, and I could not go outside of the fact of the rum runners—

Q. Regardless of what Mr. Collard told you, you still felt you were innocent of the charges in the indictment?

A. Yes, sir.

Q. Now, on September 25, I believe two attorneys came to see you.

A. Yes, sir.

Q. Do you know who sent those attorneys to you?

A. My husband.

Q. How did you know that?

A. Because they said so.

Q. Who said so?

A. Mr. Okrent.

Q. Had you discussed with your husband the matter of retaining an attorney for you?

A. I had not seen my husband since I was transferred from the Immigration Detention Home to the Wayne County Jail; I had not seen him, and he did not even know that I had the indictment.

Q. So, up to the time when the two attorneys visited you in the County Jail you had not seen your husband?

A. I had not seen my husband.

Q. Now, do you recall how long the attorneys remained with you?

A. Yes, for quite a while.

Q. How long?

A. For a couple of hours.

Q. Would you say that if the records showed that the attorneys entered about 2:50 P.M. and left the Wayne County Jail about 5:45 P.M., that would be right?

A. That could be correct.

Q. So you talked to these two attorneys for about two hours and a half?

A. I talked to one attorney, sir, and Mr. Berger was just sitting there.

Q. Which one did you talk to?

A. I talked to Mr. Okrent.

Q. Did they tell you that your husband had sent them to see you?

A. Mr. Okrent told me that he had talked to my husband, and that my husband had sent him, and that Mr. Berger came along.

Q. Did they tell you why your husband had retained them as attorneys for you?

Mr. Field: Just a minute, if the Court please. That assumes a retainer here, which has not been shown. The testimony so far is that these men came over and asked Mrs. von Moltke some questions. There was no retention of attorneys in the technical sense.

The Court: Well, I don't know that counsel claims

there was. He merely claims that they were there for a couple of hours, and a half, and we would be interested to know what they discussed during that time.

Mr. Field: The attorneys are here, your Honor.

The Court: Go ahead.

Q. (By Mr. Fordell) Did the attorney tell you that he had been retained by your husband?

A. No, because they had not been retained by my husband.

Q. Did he tell you why he had come to see you?

A. Mr. Okrent came to see me how I was, and he said that my husband had talked to him about the matter.

Q. About your case?

A. About the whole affair.

Q. Yes.

A. Because apparently my husband and Mr. Okrent had seen in the newspaper that I had been arraigned, and that I was in the County Jail, and Mr. Okrent had no definite appointment; my husband probably talked to him whether it would be possible, and Mr. Okrent inquired was I to have counsel, and I told him about the arraignment, and that Judge Moinet was going to appoint a counsel for me.

Q. Did Mr. Okrent offer to be your counsel?

A. No, positively not, because he was interested with Mr. Berger, and Mr. Berger did not commit himself. Mr. Okrent in his profession I understand is not—

The Court: Do not testify to what you just understand.

Q. (By Mr. Fordell) What did you discuss during those two hours and a half?

A. My family affairs.

Q. Your family affairs?

A. Yes, entirely, because I was very much in suspense about my child; and Mr. Okrent is a friend of the family and my husband.

Q. Why did you discuss the family affairs, and not the indictment?

A. Because it was the nearer thing to me.

Q. Because what?

A. That was what I was worried about.

Q. You were more worried about your family than you were about the indictment?

A. Yes, and this is the truth. I am here to tell you the truth, sir.

Q. Why didn't you, in addition to discussing the family affairs, also ask the attorney's advice about the indictment that you had in your possession?

A. I will answer that question very frankly to you, though I hate to do it, but in speaking about the case,—

The Court: Now, you may, so there won't be any unpleasantness—the only time you will not answer the question is when the Court says you do not have to answer, but otherwise answer as directly as possible.

A. I want to apologize. I am awfully sorry.

The Court: Go ahead.

A. Am I to answer this question?

The Court: There has not been any objection on anybody's part. It is not a matter of volunteering. You are on the witness stand, so take your time. If you do not understand the question, say so, and it will be repeated to you, and then answer as directly as you can.

A. Then would you kindly repeat the question?

Q. (By Mr. Fordell) My question was this, Mrs. von Moltke: Why was it that you did not discuss your case with the attorneys, although you discussed your family affairs with them?

A. Yes, I can give you an answer to that: Because Mr. Okrent said that my husband had talked to them, and could they help me, and Mr. Berger said, "You know I am a Jew, and you are on a Nazi spy charge, and I do not know whether—"

The Court: One moment.

A. Whether I—

The Court: One moment. Who is supposed to have said this?

A. Mr. Berger, the attorney, and the partner of Mr. Okrent.

Q. Oh, in your presence?

A. He said that to me, your Honor.

The Court: All right.

Q. (By Mr. Fordell) So that is the reason why you did not discuss the case with him?

A. So there was no—if anybody speaks to me this way, there was in my condition—I was there in the County Jail, and with the idea that Judge Moinet would appoint counsel for me. I felt that there was nothing to be said about it.

Q. Then you must have asked these attorneys at one time during your conference something about your case?

A. I did not, because my husband sent them.

Q. Well, how did Mr. Berger happen to tell you that he would not represent you, because he was a Jew, and you were charged with—

A. Mr. Berger did not tell me so. Mr. Berger said since that was the set-up, he would not know whether he would,—in reference to my husband he would not know whether he could consider even taking the case, or such a case.

Q. Did you ask him to consider the case?

A. No, I did not. Apparently my husband had asked him.

Q. Now, you were questioned on August 24, 25, 26 and 27 of 1943, by the agents; isn't that true?

A. That is true.

Q. You were not questioned any more after that, were you, by any of the agents?

A. Just once by Mr. Collard, who came to the Immigration Detention Home. That was between the time—between the time of September 1, to September 21.

Q. So that you were only questioned on August 24, 25, 26 and 27 and then one other question?

A. Yes, sir.

Q. Later on?

A. Yes.

Q. And then you were never questioned about the case any more, that is, in regard to things they wanted to know from you?

A. No, Mr. Collard and Mr. Hanaway did not question me.

Q. They did not question you any more?

A. No, I don't think so.

Q. So you were not subjected to a continuous course of questioning from the time you were arrested until you were brought into court; that is not true, is it?

A. Well—

Q. Yes or no?

A. Yes, I was questioned.

Q. Continually from—every day?

A. Whenever they came there there was one question on another they had to—Mr. Dunham and Mr. Kirby had to have certain information.

Q. Now, isn't it true that up until the time you plead guilty you repeatedly asked the agents for advice as to whether you should plead guilty or not? Isn't that true?

A. There was nobody else I could ask.

Q. Well, just say yes or no.

A. Yes.

Q. Did you?

A. Yes.

Q. And didn't they tell you to consult your attorney?

A. No; I am sorry, no, sir.

Q. And didn't you tell them that you did not want the attorney?

A. I never said such a thing.

Q. Didn't you tell them that you wanted them to tell you whether to plead guilty or not, and not the attorney?

A. No, I did not, sir.

Q. Didn't you on several occasions tell one or the other agent that you did not want the attorney that your husband had sent?

A. No, I was waiting for him, and Mr. Hanaway heard me say in the bull pen that I am going to wait for him, because my husband said Mr. Okrent would call on me again.

Q. Didn't you tell the agents that your husband wanted to get an attorney, but you did not want the attorney?

A. I did not.

Q. Your husband is trained in some respects on legal problems, is he not?

A. He is not.

Q. Isn't he a teacher of law?

A. No, he is not. He was a teacher of German.

Q. A teacher of the German language?

A. The German language, at Wayne University.

Q. Is that the only thing he has taught?

A. It is the only thing he has taught.

Q. Has he received education in law?

A. No.

Q. Are you sure?

A. Well, he probably, a certain amount of education in German law before the first World War.

Q. He has received a certain amount of education in German law?

A. Yes, I would say a certain amount of education, but his doctor's degree, the PhD is not in law, because he did not have enough.

Q. Now, while you were at the County Jail, how many times,—approximately how many times did your husband visit you?

A. In which time, please, sir?

Q. From the time that you were confined in the County Jail right up to the time that you pled guilty.

A. About four times.

Q. Wasn't he visiting you every week during visiting hours?

A. Yes, he came, the first time I saw him in the bull pen on the 28th of September, and then the next time, he would come then on Wednesday, and Sunday, visiting days, and then again on Wednesday.

Q. This was every week on Wednesdays and Sundays?

A. Well, there are just two weeks.

Q. Well, from—

A. From the 28th to the 7th of October; how many weeks are there?

Q.—That is right. Well, he exercised the rights of visitors at the County Jail, did he not?

A. For half an hour he came up to see me.

Q. And special arrangements were also made on one or two occasions for him to see you?

A. No, sir, not before that time, that was very much later when special occasions were made.

Q. Was that after you entered your plea of guilty?

A. That was very much longer, after I entered my plea of guilty, not at this time.

Q. Didn't you tell the agents that you had had some arguments with your husband regarding the matter of retaining an attorney?

A. No.

Q. Didn't you tell the agents that you were arguing with your husband because he was insisting that you retain an attorney, and you were telling him that you did not want an attorney?

A. I cannot remember any such thing. The only thing I might have said was that I could not figure where the money should come from.

Q. Well, you say you do not remember or would you say positively that you never told the agents that you and your husband were having an argument?

A. No.

Q. Over this matter of retaining an attorney?

A. Because we did not have an argument.

The Court: Pardon me. Will you stand up, please?

(A man in the court room stood up.)

The Court: Are you related to this woman?

The Man in the Audience: Yes.

The Court: Well, no matter how much you may be interested in this case, you may not be signalling to her.

The Man in the Audience: Yes, your Honor.

The Court: Are you the husband?

The Man in the Audience: Yes.

The Court: All right. Sit down.

Q. (By Mr. Fordell): Isn't it true, Mrs. von Moltke, that at one time you told the agents that you were not worried about your son any more; that you were satisfied with the way they had handled the situation for you.

A. I never told them that, that I was satisfied, and I was not worried any more. It is not true.

Q. Now, did the agents ever make any promises to you to induce you to plead guilty?

A. The FBI, sir, is a much too well trained body—

Q. Just say yes or no. You do not have to give me your opinion of the FBI. Did they ever make any promises to you to induce you to plead guilty?

A. What do you call a promise?

Q. Did they ever promise that they would do something for you if you pled guilty?

A. What do you mean by—does that cover an insinuation?

Q. Well, did any of the agents expressly tell you that if you pled guilty that they would see to it that you would get an easy sentence?

A. No.

Q. They never threatened you in any way, did they?

A. No.

Q. Did they ever tell you that you might get probation if you pled guilty?

A. It was in the discussion of things that it was assumed as a speculation, and as I said, they did not promise me anything, and they did not threaten me.

Q. In other words, they told you you might go to jail, or you might get probation?

A. No.

Q. What did they tell you?

A. It was in a discussion, sir, as I should think if an agent said, I should think that in your case it cannot be so bad, it might be even that sentence will be suspended.

Q. But no direct promise was made to you?

A. No direct, no, no.

Q. Was it you that first informed the agents that you wanted to plead guilty?

A. As I called—

Q. Did you make the request to talk to either Mr. Babcock, the United States attorney, or some agent in order to advise them that you wanted to plead guilty?

A. I did not make the request to see Mr. Babcock. In fact, I did not even know it was possible to ask for an interview.

Q. Well, how did either the agents or the District Attorney find out that you wanted to plead guilty?

A. Mr. Hanaway happened to be in the building, and I talked to him about it. Mr. Hanaway said he would

give my message to Mr. Babcock, but I opened the discussion to Mr. Hanaway about pleading guilty. I told Mr. Hanaway that after the conversation with the other woman, I felt that we were expected to fall in line, and plead guilty, not because I felt I was guilty, but I wanted to cooperate. And I asked Mr. Hanaway to ask Mr. Babcock whether—as to the three points, that I would plead guilty in order to cooperate if the publicity could be stopped right away, and if I would not be sent far away to an institution if I am sentenced, and that I never will be deported.

Q. Well, Mrs. von Moltke, what do you mean when you say that you told Mr. Hanaway that you would plead guilty to cooperate?

A. I understood that was a term which was at this time in the air in the cell block, which means to cooperate, if I be permitted to explain that to you, to cause the state very little expense, to cut the work down for all the offices concerned, and have the case closed for the District Attorney's office as quickly as possible, which in turn would be acknowledged as a cooperation, and which in turn would enable me to get the quickest way back to my child, and my family. After all, sir, there was a war on, and you have to realize the situation.

Q. Well, Mrs. von Moltke, did any of the agents ask you to plead guilty in order to cooperate?

A. No.

Q. But you claim you did tell Mr. Hanaway that that was why you were pleading guilty, in order to cooperate?

A. Yes.

Q. And then did Mr. Hanaway come back and give you the answer that Mr. Babcock had given him?

A. No, Mr. Hanaway came back this afternoon, and said Mr. Babcock would like to talk to me, and to Mrs. Leonhardt.

Q. And then you were brought into the United States Marshal's office. Is that right?

A. Yes.

Q. Did Mr. Babcock come there?

A. Yes.

Q. And what did you say to Mr. Babcock?

A. I said to Mr. Babcock that I wanted to plead—I consider to plead guilty, because—not because I am guilty, but I know he wants me to. Mr. Babcock did not say anything to that. And I said the publicity is so terrible, and that my children and my husband, they all have to live, and that I sent word to him by Mr. Hanaway if he would grant me that the publicity would be stopped, and that I would not be sent away, and that I never would be repatriated, deported, that I would plead guilty to get it over with.

Q. Did you tell Mr. Babcock that you were pleading guilty, not because you were guilty, but because you wanted to cooperate?

A. I did.

Q. And then you expressed these three conditions upon which you wanted to enter your plea?

A. Yes, sir.

Q. What did Mr. Babcock say to you?

A. Mr. Babcock answered, and said as to the publicity there is not much I can do, because we have the law of the free press; as to being sent away in prison, or to an institution, that does not rest with me; the head of this is Mr. Bennett in Washington. And he explained that you have to write to Mr. Bennett. But Mr. Babcock said in view of the condition in my family with a sick child I would get consideration, and he would give me a recommendation. And as to the deportation, about which I was worried most, as Mr. Hanaway and all the agents knew, he said it is not very likely that I would be deported since my husband is an American, and since I have three American-born children, and that he could not say what the next year would be, whether he would be in office or not, but certainly if it need be he would give me a recommendation, and he was certain that Mr. Lehr would do so. And he said he could not suggest anything to me. The decision whether to plead guilty or whatever I did rests solely with myself, because if he would do or would influence me and his office does not permit him to influence me, but he wanted me to keep in mind that he—I quote him as he said, that he said, “I

want you to keep in mind we are human''. That is what Mr. Babcock said.

Q. Didn't Mr. Babcock say to you you should not plead guilty unless you thought you were guilty?

A. I cannot remember that.

Q. You are not sure whether he said that?

A. I am not sure. I only remember Mr. Babcock said, "I cannot make any suggestions one way or the other, because I am not permitted to influence you, and that would be influencing you if I suggest anything to you."

Q. But you understood from what Mr. Babcock told you, that the decision as to whether or not you should plead guilty or not was up to you?

A. No, I was not concerned about that.

Q. Did you understand that?

A. No.

Q. You mean that you did not understand that the decision was up to you?

A. No, sir, I understood—I would have understood if Mr. Babcock would have said to me in my way I understand things; I cannot give you an answer to that. I can give you one answer to that, and that is, no, we cannot do anything for you.

Q. Didn't he tell you he had no control over the newspapers, and consequently could not assure you that publicity could be suppressed in the event that you pled guilty?

A. No; he said "There is not much I can do about it." And as I understand the American language, if you say "There is not much I can do about the case", that you mean there can be a little done.

Q. But that was your conclusion?

A. That was my conclusion unfortunately.

Q. But Mr. Babcock did tell you there was nothing he could do about it?

A. He said not much, because there is a free press, and I listened for that "not much".

Q. Didn't he also tell you that he had no control over the proceedings that might be instituted against you for the purpose of deportation.

A. I beg your pardon, sir. Would you say that?

Q. - Didn't he say to you that he had no control over any proceedings that might be started?

A. He did not.

Q. To deport you?

A. In fact, he was very kind and human by saying, "I do not think that should worry you, because"—then getting his speech—"after all, we are human." And I understood the human side of it.

Q. Didn't Mr. Babcock say that if you plead guilty you should not plead in reliance on any of these conditions that you had expressed to him?

A. Mr. Babcock did not say such a thing, because in consequence of the discussion with Mr. Babcock, Mrs. Leonhardt went ahead and pled guilty, and she said to me afterwards "Mr. Babcock, I am sure, will do for me what he can."

Q. At any rate, you did not plead guilty on that occasion?

A. I did not, because I saw my husband.

Q. And our husband told you not to plead guilty?

A. He did.

Q. He told you to get a lawyer?

A. Yes; he said I should not before I have seen an attorney; on such a question I should talk to an attorney first about the whole thing.

Q. Then you knew at that time that you were entitled to a lawyer before you pled guilty, if you wanted one?

A. I did not. I just was wondering about the lawyer who never came.

Q. Well, you knew at that time, did you not, that you did not have to plead guilty if you did not want to? Yes or no?

A. No.

Q. Your husband told you to get a lawyer, didn't he?

A. My husband said to wait until a lawyer comes out.

Q. And you decided not to plead guilty because of that?

A. Because of that, yes.

Q. And you went back to the County Jail?

A. And the answer Mr. Babcock gave me was not fully satisfactory:

Q. At any rate, you decided not to plead guilty because of what your husband told you?

A. Yes.

Q. Did you see your husband about getting a lawyer before you pled guilty?

A. No, sir; I pled guilty, and my husband even did not know it.

Q. Why didn't your husband know it?

A. Because he did not come up during this time, and I had no chance to see him. He saw me the time the next day after I had pled guilty, and Mr. Dunham and Mr. Kirby were there, and Mr. Dunham saw that I was very much upset about it, and I was crying.

Q. So, during the week you decided to disregard the advice that your husband had given you?

A. Yes, sir.

Q. And plead guilty instead?

A. Yes.

Q. You made that decision; yes or no?

A. Yes.

Q. And as a result of that decision you notified somebody to contact you about pleading guilty?

A. No.

Q. How did the agents or the District Attorney discover that you had changed your mind again, and decided to plead guilty?

A. Mr. Collard came and visited me on Thursday, on Wednesday night, and it was said to him that I would think it over, and I made the day for my last decision Thursday, and Mr. Collard and Mr. Hanaway came up Thursday, and found out, and Mr. Collard would say "Have you seen your lawyer?" And I said "No."

Q. Didn't Mr. Collard say this to you, "Have you seen your lawyer?"

A. Mr. Collard asked me if I had seen my lawyer.

Q. And you say "no"?

A. Yes.

Q. Did you tell him why?

A. No.

Q. Did he ask you why?

A. No.

Q. Did you tell him that you had decided to plead guilty?

A. No. On the Thursday he came up with Mr. Hana-way to find out what I had decided. I was very undecided about the case, and very much upset.

Q. Did you tell them then that you had decided to plead guilty?

A. I said, "All right, I will go with you", because this was the time shortly before I had this discussion with Mr. Collard which I had—

Q. (Interposing): Well, did you tell them that you decided to plead guilty?

A. Yes.

Q. And then where were you taken?

A. To Mr. Babcock's office.

Q. Immediately after you told them that you wanted to plead guilty?

A. Why they were there and took me along.

Q. And you went to Mr. Babcock's office?

A. Yes, sir.

Q. Now, what did you tell Mr. Babcock at this time?

A. I said, "I am going to plead guilty"; I said, "Though I know I am not guilty."

Q. You told him that?

A. Yes, sir, to get over with it.

Q. To get over with it?

A. Yes.

Q. You expressly told Mr. Babcock that you were not guilty?

A. Yes, I did.

Q. But you wanted to plead guilty in order to have it over with?

A. To cooperate, to fall in line, to get it over with.

Q. I believe no one had requested you to do that?

A. No.

Q. You knew that you did not have to do that if you did not want to?

A. I did not know that.

Q. When your husband told you not to plead guilty, you did not plead guilty?

A. My husband did not say because I don't have to. My husband felt that the case needs a lawyer, and I should have at least the legal advice, and I even did not know whether I really was entitled to counsel.

Q. Did you again express the three conditions to Mr. Babcock?

A. No.

Q. What else did you say to him besides telling him that you were pleading guilty although you were not guilty?

A. There was nothing else to be said.

Q. Did he advise you again of your constitutional rights?

A. No, I cannot remember that Mr. Babcock said any such thing.

Q. Didn't he say to you you should not plead guilty unless you felt you were guilty?

A. I cannot recall that.

Q. Didn't he tell you that he could not give you any assurances that the conditions that you expressed to him might be fulfilled.

A. We did not talk about that at all.

Q. Then you went directly down to Judge Lederle's court?

A. Yes, sir.

Q. Now, did Judge Lederle question you before you pled guilty?

A. Yes; he said something to me.

Q. Did he ask you if you wanted an attorney?

A. I cannot recall that, because it was in the midst of a trial, and I was so confused, and so nervous I did not hear what the judge said.

Q. Well, Mrs. on Moltke, the trial was not going on while you were being questioned by Judge Lederle.

A. But there was a court room full of people all staring and looking at me.

Q. The people were in the back of the court room, were they not?

A. They were sitting all around.

Q. They were not sitting inside the rail, between the Judge's bench and the rail?

A. Sir, you have never gone through such a procedure probably.

Q. These people were not crowding around you, were they?

A. There was a crowd, and the moment I entered, and had to wait, all these people were looking at me, and I was very, very nervous, because I did not go with a light heart, and say, "I am guilty, your Honor, and I want to change my plea."

Q. Well, do you remember the Judge asking you if you wanted an attorney before you pled to the indictment?

A. No, I only remember that Mr. Babcock handed him a folder, and the Judge looked into that, and he said, "I cannot accept this change of plea", or something in legal language, because on account of an attorney, and one thing and another; I heard "an attorney", and he could not accept that.

Q. Do you remember the Judge asking you if you had read the charges in the indictment?

A. I remember that the Judge said, had the indictment been explained to me.

Q. And what did you say?

A. I said yes, because Mr. Collard has explained to me.

Q. Do you remember the Judge asking you if you were pleading guilty because you were guilty?

A. Yes.

Q. And what did you say?

A. I said yes, because I had made the arrangements with Mr. Babcock. I cannot go to Mr. Babcock and say "I plead guilty, because I want to cooperate"—

The Court (interposing): One moment. I do not want the record to appear that you made any arrangement with Mr. Babcock. Under your own evidence you had made no arrangement with Mr. Babcock. Now go ahead.

Q. (By Mr. Fordell): Mr. Babcock did not request you to plead guilty, did he?

A. No.

Q. Mr. Babcock told you that if you wanted to plead guilty it had to be voluntarily on your part, didn't he?

A. It might be.

Q. Well, aren't you sure of that?

A. I am not sure of that.

Mr. Field: If the Court please, I am sorry to interrupt, but I believe this is more or less beside the point, and outside the issue. There is no claim in the petition that Mr. Babcock made any representations or propositions.

The Court: Well, the witness used the word "arrangement" with Mr. Babcock, and that is what I want and do clear from the record, that there is no testimony or evidence at all, even her own, that she made any arrangement with Mr. Babcock.

Mr. Field: We make no such claim in the petition.

A. (By the witness) I beg your pardon, your Honor. The word "arrangement" I did not mean that.

The Court: What did you mean?

A. There must be—naturally I did not mean "arrangement". I used the word, but this is not what I wanted to say.

The Court: Well, it is off the record, anyway; it will be stricken. You certainly had no arrangement with Mr. Babcock.

Q. (By Mr. Fordell) You say that when Judge Lederle asked you whether you were pleading guilty, because you were guilty, you said "yes"?

A. I said "yes".

Q. You understood that question, didn't you?

A. I did understand that question.

Q. And you intelligently answered it, didn't you?

A. I said "yes", because I said before to Mr. Babcock "I am going to plead guilty."

Q. And then the Judge asked you whether you wanted an attorney?

A. I do not remember that he asked me that question.

Q. Did he ask you to sign something?

A. No. A note was given to me, and I don't know who gave it to me.

Q. Did you sign it?

A. Yes, after I asked Mr. Babcock about it.

Q. Did you read it?

A. I read it.

Q. What do you remember reading?

A. I remember that it was said that I was to appear for trial in court if I was requested to do so, and I did not want that.

Q. Did you sign it?

A. I asked Mr. Babcock what that trial affair means, and Mr. Babcock said that it is more or less a—I understood that a matter of form, and he said that is all right, you can sign this. And I signed it.

Q. You are sure the form did not read something like this: "I, Marianna von Moltke, being the defendant in the above-entitled cause, having been advised by the Court of my right to be represented by counsel, and having been asked by the Court whether I desire counsel to be assigned by the Court, do hereby in open court voluntarily waive and relinquish my right to be represented by counsel at the trial of this cause."

A. I am sorry, sir; I seem to recall that I had not such a long sheet, that it was a small piece of paper.

Mr. Fordell: Well, I do not think there is any question as to what she signed.

Mr. Field: We will concede that the exhibits attached to the return to the order to show cause are part of the evidence in the case.

Q. (By Mr. Fordell) Now, after you left the court, isn't it true that Mr. Collard here tried to protect you from having your picture taken by the photographers?

A. That is after we went around the corner, and Mr. Collard did not try to protect me, but Mr. Collard did not object as I shoved him over. But later on he said, "I could not have been shoved you could not have shoved me, if I would not have let you." And I acknowledged that it was very kind of Mr. Collard.

The Court: You said that you did not think the paper was as large as the one counsel offered you. It may be because that is a photostatic copy, and is black, and it looks larger. Was that the type,—look at that paper.

A. Yes, but I cannot remember—

The Court: That is the form that is used?

A. Well, I think that—I tell the truth, your Honor. I cannot remember.

The Court: Do you remember reading something?

A. Something about I was to appear for trial.

The Court: Oh, well, there is nothing on this about appearing for trial.

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ARCHIE KATCHER was thereupon called as a witness on behalf of the Petitioner, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Kronner:

I am now referee in bankruptcy of this court. On the 21st of September, 1943, I was employed by the Referees in Bankruptcy. I am a member of the Michigan State Bar. I was admitted to practice in 1940. I was a practicing attorney on September 21, 1943. I was engaged in the part-time practice of law at that time. I had been employed in the referee's office approximately ten years at that time. I was combination clerk and printer.

I recall, having seen Mrs. von Moltke in the court room of Judge Moinet when she was brought in for arraignment. She was with Mrs. Leonhardt, who was also a defendant, and several other men, some of them from the U. S. Attorney's office, and others whom I did not know. I was engaged in trying a lawsuit in Judge Moinet's court when these women were brought in.

Q. Did Judge Moinet appoint you as counsel for either or both of these women?

A. He appointed me for both of them.

Q. Will you state the circumstances under which that appointment was made?

A. Well, I was in court defending somebody, I don't know who it was, another matter in which I had been appointed to represent this indigent defendant, and that matter was going on at that time, and it was interrupted by the bringing in of Mrs. Leonhardt and Mrs. von

Moltke. There was some whispering in front of the court room after our proceedings was suspended, and then Judge Moinet motioned me up to his bench, and he asked me at that time in a whispered conversation whether I would represent Mrs. Leonhardt and Mrs. von Moltke. I do not remember the exact conversation that I had with Judge Moinet at that time. It was whispered, as I said, but I did somehow convey to Judge Moinet the thought that I did not want to be in that case, and then Judge Moinet said, well, it would just be for the arraignment, and it would only take a few minutes. And then I agreed to do so, and he did appoint me for both women, Mrs. Leonhardt and Mrs. von Moltke.

Q. You had never seen Mrs. Leonhardt or Mrs. von Moltke before that?

A. No, I had not.

Q. You had never talked to them before that?

A. No, I did not. I had not, no, sir.

Q. And then after you accepted this appointment to appear for Mrs. von Moltke and Mrs. Leonhardt at the arraignment only, did you have any conversation with Mrs. Leonhardt and Mrs. von Moltke?

A. Yes, I did, right there in the court room.

Q. Were they sitting down at the time?

A. Yes, they were both sitting down, on that side (indicating). Judge Moinet's court room is set out much like this. There are chairs over along that wall. Both were sitting there together.

Q. And after you accepted the appointment, you then went over and talked to them?

A. That is right, yes.

Q. Did you sit down?

A. No; I believe I bent over, and talked to both of them in a whispering manner.

Q. Will you tell the substance of that conversation?

A. Well, I asked both of them, that is, both at once, whether they understood what this was all about. I believe that is quite similar to the language I used. And one or the other of them said, yes, they did understand, and the other indicated that she, too, understood. And

then I asked if they felt that they were guilty or not guilty, and both indicated that they felt they were not guilty. I then rather hurriedly explained to them the advantage of standing mute as against pleading not guilty at that moment, and it was agreed that they would both be stood mute.

Q. And then what happened?

A. Well, I took them both up before the Court; I believe that Judge Moinet was sitting there all the time; and we came up before the clerk's bench, and I indicated to the Court that both defendants were standing mute.

Q. Do you recall whether Judge Moinet said, while you were there, that he would appoint counsel for Mrs. von Moltke?

A. I am not too sure of that. I do know that it was definitely understood that I was to represent them on the arraignment only.

Q. How long did this conversation that you had with Mrs. von Moltke and Mrs. Leonhardt—how long a time did that occupy?

A. Just a matter of a couple of minutes.

Q. And as I understand it, it was a whispered conversation?

A. That is right.

Q. Entirely?

A. Yes.

Q. You did not have the indictment?

A. No, I did not.

Q. You did not advise them of the nature of the charges?

A. No, I did not.

Q. You did not advise them on anything excepting as to their advisability of standing mute?

A. That is correct.

Q. Was that the extent of the service, of the legal assistance that you gave Mrs. Leonhardt and Mrs. von Moltke?

A. Yes, I had no further contact with them.

Q. Did you enter your appearance formally for them?

A. Yes, later on that day.

Mr. Field: If the Court please, I believe the appearance is in the file. We would like to have it made a part of the record in this proceeding.

The Court: You may do that.

Mr. Field: No objection, Mr. Fordell?

Mr. Fordell: No.

The Court: I do not think there is any dispute about the matter, is there?

Mr. Fordell: No, your Honor.

The Court: It is admitted.

Mr. Kronner: I think there would be an order of appointment also.

The Court: That is ordinarily true. It is in this court.

Mr. Kronner: So both the order of appointment also—

The Court: That may be admitted also.

Mr. Fordell: If they are in the file. If they are in the file, there is no objection.

The Court: It is conceded that was done. That is the ordinary routine.

Q. (By Mr. Kronner) You say you asked Mrs. von Moltke if she knew what the charges were?

A. I don't think I put it quite that strongly. I think I said to her, "Do you understand what this is all about?"

Q. And what did she say?

A. She said yes; either she did or Mrs. Leonhardt did. I am frank to say I am not too clear on it, but they both indicated their understanding. That much is true.

Q. And they both indicated that they were innocent?

A. Yes.

Q. And for that reason you stood mute for them?

A. That is correct.

ISADORE ARNOLD BERGER, was thereupon called as a witness on behalf of the Petitioner, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Field:

I am an attorney admitted to practice in the courts of

the State of Michigan and the senior member of a law firm located in Detroit. Harry Okrent has been associated with my firm since 1943.

Q. Do you recall an occasion on September 25, 1943, when you accompanied Mr. Harry Okrent to the Wayne County Jail?

A. I recall going to the County Jail with Mr. Okrent but I do not recall the exact date. On that occasion I saw and talked with Marianna von Moltke. Mr. Okrent was present at that time. He did most of the talking. We both talked. He may have carried most of it. I am not quite sure. I understood Mr. Okrent's connection with the case involving Mrs. von Moltke. I understand that he was a student of Mr. von Moltke in German at Wayne University. As to how long Mr. Okrent and I conferred with Mrs. von Moltke at the Wayne County Jail I could not say excepting that we spent some time with her, and she told us her story in quite detail. I interrogated Mrs. von Moltke as to the reasons why she was in jail, and the charges that had been made against her. I think I saw the indictment at that time. We went to see her at the request of her husband; that is, I don't think he made that request of me. The request was made, I believe, of Mr. Okrent, and I went along with him. It was partly at my request, and part Okrent's that I go with him, and I thought maybe under the circumstances I ought to go with him.

Q. And what did you find Mrs. von Moltke's condition to be at the County Jail? If you found it to be otherwise than normal?

Mr. Fordell: I object to that. He cannot testify as to her physical condition.

Mr. Field: I think he can, if there was anything abnormal about it.

The Court: Did you know her?

A. Before? No.

The Court: How could he make a comparison?

Mr. Field: It is a good point, I say, your Honor, but I imagine if her actions and her conduct were abnormal as viewed from the usual standards that Mr. Berger would perceive that.

The Court: Yes. If there was anything very unusual. A person screaming or crying convulsively; if there is terror in their face, or voice; those things are not normal in anyone. And if they were there, those may be described.

But what her ordinary attitude was, or her ordinary voice, or her ordinary emotional exhibition, if he had never seen her before, he certainly cannot be in a position to compare it with any other condition.

Q. (By Mr. Field) Well, I will ask you whether you found any conditions that the Judge mentioned existing with respect to Mrs. von Moltke?

A. That she was nervous, and talked rapidly, and fidgety.

The Court: You see. I talk so rapidly sometimes the court reporter has got to stop me, and I am not nervous. So that would not indicate nervousness in itself. There are a lot of people that talk rapidly, and a lot of people twist their fingers.

Mr. Field: I think your Honor is right about that, absolutely; so I will withdraw the question.

Q. (By Mr. Field) What did Mrs. von Moltke talk about during most of your interview, Mr. Berger, if you can recall?

A. About this case, about the indictment, or the conspiracy under the Espionage Act. We wanted to know the whole story, and I presume she told us. I think she did. Mr. Okrent went there at the request of Mrs. von Moltke and I went along because of the nature of the case, and the country being at war, and Okrent and I being of the certain race that was particularly affected by the war, and then also there was our emotional feelings toward her people generally at the time, and then our duty as lawyers was argued back and forth, and should we or should not we, or should he or should not he, so I said, "Well, I will go along with you, Harry"; because he went along not as an attorney, and we had that definitely understood that neither of us—

The Court: Well, pardon me. With whom?

A. With Mr. von Moltke.

The Court: Well, all right now. Let us stop there a minute. It was your associate who talked to Mr. von Moltke, was it not?

A. Well,—

The Court: Did you talk to him, too?

A. Yes, I did.

The Court: Before you went there?

A. Before I went there.

The Court: All right; I understand the instructions came through your associate.

A. It did; but I was there, and he requested Okrent to go.

The Court: All right. Then you heard the instructions that were given by the petitioner's husband?

A. That is correct.

The Court: All right. You may tell about it.

A. That we would not act as attorneys, that we would go there and see what she had to say, listen to her story, and come back and report to Mr. von Moltke what she had to say. He was nervous, too. And I said to Harry, "We will go over there, and talk to her,"—and then when we went in there, we said to her, Mr. Okrent and I, part of it was my conversation, and part of it was his; that we were not appearing there as her attorney, or as an attorney; I did not want to restrict myself in—if she should disclose any information that I thought the Government should know, I should be free to disclose that. I told her then that whatever she was saying was not being said to an attorney as an attorney, that I was merely there with Mr. Okrent, and he was there on the same basis, to find out what it was about. If she wanted to talk, she could tell us; but that we were not holding anything that she said in confidence; that if she wanted to tell us, she was free to do so. And we explained to her who sent us, and she proceeded to tell us the story.

Q. You did mention the fact that being of the Jewish faith, that it was an embarrassment or complication in the matter, did you not?

A. Yes. And we had quite a bit of discussion in the office over that matter, and we felt it was at least our

duty to go over there and talk to her, and report back to her husband.

Q. And during the interview, do you recall whether Mrs. von Moltke expressed any concern for her husband, or her children?

A. Yes.

Q. And was that discussed?

A. Yes; I asked her questions about—there were matters that were in my mind; I wanted to know whether she was guilty; I was interested in that; and I asked her questions that I directed her conversation along certain lines, and she answered them, and she was quite interested in her husband, and how he was getting along, and whether he would be reinstated or how was he taking it, and about this diabetic child. And then we went into these two children that were in Europe, and I tried to find out whether that did not point to her guilt, as to why they sent them over there, and so forth.

Q. Did she explain that to you?

A. She explained that to me.

Q. And did you during this interview, did you or Mr. Okrent, rather, during this interview, advise her of the nature of the charges made against her, or their implications of the charges?

A. No, sir.

Q. And did you advise her of possible defenses, or legal rights, that she might have, by way of demurrer, or motion to dismiss, or anything of that kind?

A. No, sir.

Q. And after you had concluded your interview with Mrs. von Moltke did you consider the advisability of representing her as attorneys?

A. Well, we discussed that many times.

Q. I mean you and Mr. Okrent.

A. Yes, the two of us discussed it many times, and we argued over the matter.

Q. And did you finally come to a conclusion?

Mr. Fordell: Well, it is not material here as to what conclusion they came to.

Mr. Field: Well, it is a nice ending for this testimony.

The Court: Well, you decided not to do it?

A. No.

The Court: Did you represent her?

A. No. We had hoped that the issue would not be presented where we would have to decide. I did discuss the matter with a prominent member of our faith, and what if the matter was put squarely up to us, "Will you take it?" Or "We want you to take it"; what should we do? It was not just an ordinary issue. And he advised us "yes".

Q. (By Mr. Field) And did you finally report to Mr. von Moltke of your decision?

A. No, not of the decision. We just reported what Mrs. von Moltke said.

Q. And was that the end of the matter, so far as you and Mr. Okrent were concerned?

A. No; that was as far as we were concerned, in reference to Mrs. von Moltke. Mr. von Moltke came up to see us, to see Okrent primarily, and if he was not there I would have a few words with them.

Q. But were you ever retained by Mr. von Moltke?

A. No, sir; excepting that Mr. Okrent was assigned by the Court to represent her on a motion to withdraw her plea.

Q. That was some time later?

A. That is right.

Cross Examination

By Mr. Fordell:

Q. Well, Mr. Berger, you and Mr. Okrent went over to the Wayne County Jail to see Mrs. von Moltke primarily to discuss the charges that were in that indictment?

A. Yes, sir.

Q. You did not go there to discuss the condition of her son primarily?

A. No, sir.

Q. Nor the consequences to her husband with regard to his position; is that right?

A. Not specifically. That was not the purpose.

Q. Your purpose was to discuss this case with her?

A. That is right.

Q. And you did discuss this case with her?

A. That is right.

Q. You read the indictment at that time?

A. Yes, I did; yes.

Q. Did you read it to her, to Mrs. von Moltke?

A. I read parts of it. There were certain—she stated her story, and then I wanted to—well, it was a form of cross-examination. There were certain charges in the indictment, and I said, well, how about this? And then she gave me her answer to that.

Q. You examined her insofar as the indictment affected her?

A. Yes, sir.

Q. So you covered the charges that were more or less directed toward her?

A. Not—I may have, but not fully. I just picked up as I glanced through it. It was quite lengthy. And I glanced through it, and as I found something in there that pertained to her that I thought might be embarrassing to answer, I presented it to her to see what she had to say, and she gave me an answer.

Q. Well, you knew that she had read the indictment before that?

A. I thought she had, presumed that she had.

Q. From her conversation, did you so understand?

A. Oh, I don't know why I presumed it; I just think she read it; I don't know.

Q. But she did protest her innocence of the charges contained in the indictment?

A. That is correct.

Q. So part of the time that you spent with her was devoted to the discussion of this case?

A. Well, it was all around the case, and the incidental phases of the case.

Q. Did she tell you at any time that she did not want you as counsel during that interview?

A. Well, no; we stated specifically a couple of times, because she asked us some questions, you know, what she all should do, and we emphasized it a number of times that we cannot advise you, remember now we are not telling you or advising you as a lawyer, we are not

telling you what to do, but we are just here to find out what this is about, and ask some questions, and go back.

Q. Did you at any time during this interview tell her that she was entitled to counsel?

A. That I do not recall. I may have. I do not recall that.

Q. You may have told her that she was entitled to counsel if she requested it?

A. I may have.

Q. What were some of the questions she wanted answered?

A. Well, the only thing that—the question of pleading guilty came up, and would her husband get his job back, or would it go easier with her, or something pertaining to pleading guilty, and whether it would not be better if she did. And I again reiterated to her that I am not going to advise you whether you should plead guilty or whether you should not; if you are guilty, plead guilty; and if you are not, do not; and I cannot and Okrent cannot tell you yes or no on the thing, and then I told her again why we were there.

Q. Well, did you tell her if she was not guilty she should not plead guilty?

A. Just how I worded it, I could not—I do know, that part I do know.

The Court: Well, in substance you have already said that; you said that you told her if she were guilty to plead guilty, and if she were not guilty, not to plead guilty.

Q. (By Mr. Fordell) You told her that?

A. Something to that effect; that I am not here to advise you.

Re-Direct Examination

By Mr. Field:

Mr. Okrent is in Rochester, Minnesota, for a check-up, and he will be back probably Wednesday.

Mr. Field: If the Court please, with Mr. Berger the petitioner rests.

The Court: Very well. Mr. Fordell.

CHARLES T. HANAWAY was thereupon called as a witness on behalf of the Respondent, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Fordell:

My name is Charles T. Hanaway. I was employed by the Federal Bureau of Investigation during the year of 1943. I had occasion to meet the petitioner in this case. I was one of the officers who first arrested her. I believe that was on August 24, 1943. And from that date until the time she entered her plea of guilty, I saw her on several occasions. I saw her the first time on the morning of August 24, when we arrested Mrs. von Moltke. We questioned her that day; on August 25, August 26 and August 27; I saw her on all four of those days. To the best of my knowledge I did not question her after those four days.

Q. Did you at any time make any promises to the petitioner in this matter, promises of any kind or nature to induce her to plead guilty?

A. I did not.

Q. Did you threaten her in any manner to induce her to plead guilty?

A. No, sir.

Mr. Field: Well, if the Court please, there is no charge or claim of threats in this case.

The Court: I think the petitioner's own testimony, she said there has been no promises and no threats.

Q. (By Mr. Fordell) Did she at any time ask you for advice in the matter?

A. Now, I might say at this time that this is almost two and one-half years, your Honor, and my recollection on a lot of things is not too clear. But to the best of my recollection, on one occasion that I went over to the County Jail Mrs. von Moltke had the indictment there. In fact, I did not even know that an indictment had been returned, I believe, and at least I had never seen the indictment. And she asked me to explain the indictment to her, and I refused to attempt to explain the indictment.

Q. Did she at any time ever ask you after that for advice, as to whether she should plead guilty in the case?

A. That is a very hard question to answer. I know there were—the question came up a few times. I want to make this clear. I did not visit Mrs. von Moltke a great deal after the questioning, that is, the first four days of questioning, and the few times I was over there there was general discussion among the three ladies that were in there, and the agent that were around, and it centered about whether they were going to plead guilty, or they were going to trial, or what was going to happen. And they were all trying to make up their minds. I do know that for some time—at some time or other I told Mrs. von Moltke that if she felt that she were innocent in her heart she should under no circumstances plead guilty. Now, when I told her that, I don't know.

Q. Well, on one occasion she did advise you that she wanted to plead guilty.

A. Yes. I do not recall how that came about. I believe there was a telephone call at the office for me to go over to the jail, but I am not sure about that.

Q. At any rate, you went over there?

A. I went over to the jail. Mrs. von Moltke told me that she decided to plead guilty. I do not recall about when this took place. I would say that it was probably on the latter part of September, but when I don't know. I would say it was a couple of weeks before she entered her plea of guilty in the case. She told me that she had decided to plead guilty, but that before she pled guilty there were certain things that she wanted to know; there were certain conditions as she put it. I believe that was the word that she used. The conditions were three, as I recall them: One was that if she plead guilty she would not be deported after the expiration of her sentence; the second one was that she be sent to some penitentiary or institution near Detroit so that her family could visit her; and the third condition was that the newspaper publicity be stopped. I, of course, told her that in my capacity as an FBI agent I had no control over any of those things, but that I would convey her message to Mr. Babcock, which I did.

Q. Did she say to you at that time that she was pleading guilty because she wanted to cooperate?

A. If she did, I do not recall it.

All I remember was these three conditions upon which she predicated her plea. I communicated her message to Mr. Babcock. To the best of my recollection I communicated to her the answer Mr. Babcock gave me. Now Mrs. von Moltke has stated that I came back and told her that Mr. Babcock wanted to see her. She may be correct, but I believe that I told Mrs. von Moltke what Mr. Babcock told me about these conditions. I recall what Mr. Babcock told me.

Q. Will you tell the Court what you told her as to what Babcock's answer was on those conditions?

A. Well, Mr. Babcock told me that as far as the publicity was concerned, of course he had no control over the papers whatsoever. That was something that he could not control, and he could not do anything about it. As far as the deportation proceedings were concerned, he told me that that matter was in the hands of the immigration and naturalization and he had no control over it. As far as being sentenced, or stationed at some institution near Detroit, he told me that again he had no control over that, that the Bureau of Prisons after sentence was passed designated the penitentiary or institution in which the sentence might be served. But he did state that under the circumstances, that was with her child being ill, or diabetic, he would write a letter of recommendation to the Bureau of Prisons recommending that she be sentenced to some institution or sentenced or sent to some institution near Detroit. But he also emphasized, and I believe I also emphasized it to Mrs. von Moltke that the recommendation was not binding upon the Bureau of Prisons. In other words, he had no power, it was merely a recommendation, and nothing else.

I frankly do not remember what Mrs. von Moltke said after I had related what Mr. Babcock had told me. Mrs. von Moltke and I probably discussed this matter, but the conditions were there, I mean they were facts. She indicated that she still wanted to plead guilty. She was

then taken to the Marshal's office. Now, whether it was that day, or another day, I don't know. It was that day, or within a day or two. I believe Mr. Collard and I took her over to the Marshal's office. Mr. Babcock talked to her at the Marshal's office. I was present at a good part of the conversation. There was some of the conversation that I do not believe I was present at. These three matters were brought up again, and I was present when Mr. Babcock told her exactly what he had told me before, and I had related to her before, on the conditions.

Q. Well, did she, when talking to Mr. Babcock, tell him that she was pleading guilty although she felt she was not guilty?

A. I do not recall her saying anything like that.

Q. Do you recall her stating that she was pleading guilty because she wanted to cooperate?

A. I do not recall that.

Q. Had she at any time told you that she wanted to plead guilty in order to cooperate with the Government?

A. Not to the best of my recollection. In fact, as I have stated before, at some time or other I told Mrs. von Moltke that if she were innocent she should not under any circumstances plead guilty.

Q. Did you at any time during this period right up to the time she pled guilty, suggest to her that she plead guilty in order to cooperate with the Government?

A. I did not.

Q. Did you at any time tell her that it would be wiser for her to plead guilty?

A. I did not.

Q. And you say that Mr. Babcock again repeated to her that he had no control over the newspapers in order to assure her that the publicity would be suppressed?

A. That is correct.

Q. That he had no control over any proceedings that might be started thereafter in order to deport her?

A. Yes; he not only stated that, but as I recall, he went a little further there at the cell than he had gone in his original instructions to me, or the message that I carried. He also stated that he did not know how long

he would be in the United States Attorney's office and that if he left the United States Attorney's office six months from then, or a year from then, he was no longer in a position to do anything if he wanted to do anything.

Q. Well, did he tell her that if she pled guilty it would have to be independently of any of these conditions she had expressed to him?

A. Yes. He did tell her that.

Q. Did he tell her that she should not plead guilty unless she felt she was guilty?

The Court: Well, he said that before.

Mr. Field: If the Court please, these questions are quite leading.

The Court: Yes.

A. Well, I might sum it up this way: There is absolutely no question, and Mrs. von Moltke pled guilty without reliance upon any conditions or anything that Mr. Babcock may have promised her at that time.

Q. (By Mr. Fordell): Did Mrs. von Moltke plead guilty on that occasion?

A. She did not.

Q. Did she express to anyone in your presence why she had changed her mind?

A. Well, her husband saw her then some time while this was—he saw her in the Marshal's office. And the conversation between Mr. von Moltke and Mrs. von Moltke was private. I did not hear it. After it was over with,—it was a fairly lengthy conversation—she had decided not to plead guilty, and she was taken back to the Wayne County Jail.

Q. Did she state that her husband had told her that she should get a lawyer?

A. I cannot recall that.

Q. Were you present when she was brought to Mr. Babcock's office the second time?

A. I don't think I was.

Q. Were you present when she was taken before Judge Lederle to enter a plea of guilty?

A. To the best of my recollection, I was not up in the front of the court room; in other words, I was up-

stairs, and I had heard that this arraignment was going to be made. In fact, Mr. Collard and I think the Deputy Marshal had gone over and got her, and I walked into the back of the court room in time to hear the arraignment, but that again is the best of my recollection.

Cross Examination

By Mr. Field:

I am an attorney by profession. I have been practicing law since 1931. I am a graduate of the University of Wisconsin. I was an attorney, and had had practical experience as an attorney for ten years before I became associated with the Federal Bureau of Investigation. After I and my associate members of the Federal Bureau of Investigation had arrested Mrs. von Moltke, we took her to the Federal Building. There she was fingerprinted and photographed and a doctor examined her.

Q. What form did the interrogation take? Just how was that done?

A. Well, Mr. Collard and I were seated at a table with Mrs. von Moltke, and we had a stenographer in the room, and we asked her questions which she answered. The stenographer of course was recording everything. The questioning on the first morning I do not know the exact time it started. It was probably 10 or 11 o'clock, or something like that. We stopped at lunch time. Mrs. von Moltke had lunch. Mr. Collard and I reviewed the notes that the stenographer had written up. In other words, we changed stenographers, so that one would take for a half hour, and then another one would take, and we would start questioning again in the afternoon probably one or 1:15. There is a log there that gives the exact times just exactly what went on.

Q. You kept a record?

A. A record was kept of every minute that was spent in that room.

Q. I don't know whether you testified or not by what authority you arrested Mrs. von Moltke.

Mrs. von Moltke was arrested under a presidential warrant as a dangerous alien enemy.

Q. And was she the only one that was arrested on presidential warrant in this case?

A. Mrs. Leonardt was also arrested on the same type of warrant.

Q. And the rest of the defendants were arrested how?

A. I believe that all of the other defendants were arrested on criminal warrants. I am not quite sure of that.

Q. Then after this questioning in relays, if I am not misrepresenting what you said, Mrs. von Moltke would be taken to the Immigration and Detention Home, would she not, for the night?

A. I do not quite understand what you mean by questioning in relays.

Q. I have—

The Court (interposing): I think he misunderstands what you said. The relays were the stenographers, not the agents.

Mr. Field: Well, perhaps I had better ask about that.

Q. (By Mr. Field): Did more than one agent of the Federal Bureau of Investigation interrogate Mrs. von Moltke immediately after her arrest, and for several days following?

A. No; Mr. Collard and I were working together. He might ask a question; I might ask one; I might ask 15; and Mr. Collard none. It all depended.

Q. And then you would have more than one reporter taking a transcription of the examination. Is that correct?

A. Not at one time.

Q. No; but in relays?

A. The reason we were doing that was so that the work—everything could be written up, so that during the noon hour when Mrs. von Moltke was eating, and resting, we could go over the testimony, all the questions that she had answered in the morning, and the same thing would happen at approximately 3 in the afternoon, or 3:30, and approximately 6 to 7.

Q. In the evening?

A. In the evening, yes. In other words, we always had stuff to work on while she was eating and resting.

Q. And did you advise Mrs. von Moltke of any charge that had been made against her other than she had been arrested on a presidential warrant as a dangerous enemy alien?

A. Well, at that time there was no other charge against her. I had no right to advise her of anything, except that she had been arrested under a presidential warrant.

Q. And did you advise her as to her rights to have legal representation in that proceeding?

Mr. Fordell: Well, I object to that. That is not important in this case.

The Court: No. And further, she was not entitled to it.

Mr. Field: We concede that.

The Court: Then why ask him about it?

Mr. Field: Well, the point is, as to this petitioner, if she was advised at that time that she was not entitled to have legal representation, how would she know later after she was handed this document called the indictment?

The Court: Well, you are arguing that now. Do you wish to argue it? She was told by two judges that she was entitled to counsel. Go ahead.

Q. (By Mr. Field): Was Mrs. von Moltke anxious to see her husband or her child or children during the time that she was held for examination by you and Mr. Collard?

A. Yes.

Q. And was she held in what is called incommunicado?

A. I don't know what you mean by "incommunicado".

Mr. Fordell: Well, I object to it, as it is not material.

The Court: The objection is sustained. You are speaking of the time she was held under the presidential warrant?

Mr. Field: Yes, your Honor.

The Court: All right.

When the indictment was delivered to Mrs. von Moltke, I was not there. She did not discuss the indictment with me. She asked me to explain it to her. I presume she

knew at that time that I was a lawyer. I believe to the best of my recollection my exact words were these. I said: "Mrs. von Moltke, I am not a criminal attorney, and I do not want to attempt to explain this indictment to you." And I believe that I also told her that she should either have her attorney, or the United States Attorney explain it to her. Mr. Collard was there at that time.

Q. And did Mrs. von Moltke appeal to Mr. Collard to explain the indictment to her?

A. Yes.

Q. And did he explain it to her?

A. I believe that he explained it to her.

Q. And do you recall the substance briefly of his explanation?

A. I do not.

Q. Do you recall whether he gave any illustrations?

A. He used some illustration in explaining the indictment. I do not recall what the illustration was.

Q. Did he explain what was meant by conspiracy?

A. I believe he did. I do not recall whether Mr. Collard used the example of a rum runner. That may have been the example; and it may not have been, as far as my recollection is concerned. I do not recall whether Mr. Collard made any statement to Mrs. von Moltke about himself being a lawyer. I don't know whether he is a lawyer or whether he is from Texas.

Q. Did you understand the explanation that was given to Mrs. von Moltke?

Mr. Fordell: I object to that. That is not important in this case.

The Court: No, I think not. The witness may not be as bright as Mrs. von Moltke.

The Court: Your objection is sustained.

Q. (By Mr. Field): Mrs. von Moltke did not attempt to influence you to obtain a lighter sentence for her, did she?

A. No, she did not. I think she understood quite clearly I had no powers along that line.

Q. Would it be possible for Mrs. von Moltke not to know whether she was innocent or guilty?

Mr. Fordell: I object to that.

The Court: The objection is sustained.

Q. (By Mr. Field) Do you recall Mrs. von Moltke expressing to you a concern of whether or not a plea of guilty on her part would bar her husband from teaching at Wayne University?

A. I do not remember that ever coming up.

Q. Is it because your recollection does not serve you, or is it because you do not think that she did ask you that?

A. I just don't remember.

Q. Well, now, I am not attempting to refresh your recollection on that particular point, but isn't it true that Mrs. von Moltke was concerned about her husband and his job and her children?

A. She was concerned about her husband and his job, and I don't know when he lost the job, or whether he was going to, or whether he would lose the job. She was worried about her husband and her children.

Q. And I believe she did speak of publicity, newspaper publicity?

A. Well, the publicity, in fact the first time I heard anything about publicity was this time that I conveyed this message to Mr. Babcock. I think I was present when Mrs. von Moltke appeared before Judge Lederle on her plea of guilty. I think I was in the fact of the court room; in fact, I am quite sure I was there. I know Mr. Collard was present. I don't know of anyone else. I think there were others present, but I don't remember. I believe that I do recall some of the things that were said by Judge Lederle.

Q. Do you recall the Judge stating to Mr. Babcock that he did not believe that he could accept a guilty plea because there was an appearance of an attorney in the file?

A. I do believe I remember that.

Q. And do you remember that there was some colloquy or conversation between the Court and Mr. Babcock on that point prior to the plea being accepted?

A. Yes, I do believe there was some discussion and I believe that Mrs. von Moltke also entered into it with the Judge.

I do not recall seeing Mrs. von Moltke signing a paper in Judge Lederle's court room. I think the court room was crowded. Mrs. von Moltke appeared before the Judge during a recess, as I recall it.

JAMES H. KIRBY was thereupon called as a witness on behalf of the Respondent, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Fordell:

I was employed by the Federal Bureau of Investigation in the year 1943. To a certain extent I entered into the investigation and the prosecution of the petitioner in this case. At no time in my conversations with the petitioner did I make any promises to her to induce her to plead guilty or give her any advice as to what she should do with regard to pleading guilty in this case. Mrs. von Moltke referred to the incident of publicity which has previously been testified to in connection with Mr. Babcock, and that question was raised, and I did tell her that we as agents have no control over the press. She expressed the opinion that, or stated that she did not want an attorney on one instance, I believe. That was at the County Jail before she plead guilty, as I recall.

Q. Will you tell the Court what occasioned her to make that statement?

A. I believe it was after the time that she came to the Federal Building and had talked with Mr. Babcock; that was September 28, I believe, and had then decided not to appear before the Judge and plead guilty as Mrs. Leonhardt did at that time.

I believe some time after that, in connection with the publicity matter which she testified to, the conversation regarding the publicity as I recall centered about whether or not she should plead guilty, and I advised her at that

time or told her that that would be a question for her to decide, or her attorney, as we had understood from Mrs. von Moltke that Mr. von Moltke was interested in obtaining an attorney for her.

Q. And what did she say when you told her about consulting her attorney?

A. She, as I recall, jerked her shoulders, and said she was not interested; that she wanted to make up her own mind.

Q. Did she at any time tell you that her husband wanted her to have an attorney, and that she did not want an attorney?

A. I recall no other incident.

Q. (By Mr. Fordell) You have testified that you understood she had an attorney; is that true?

A. I was aware that she had talked with an attorney.

Q. How did you know that?

A. I believe she had advised me that one had come to the Wayne County Jail.

Q. Did she tell you whether she was going to retain this attorney or not?

A. No, I do not believe that she said definitely if she would.

I was not present when Mrs. von Moltke talked to Mr. Hanaway about entering a plea of guilty or when she talked to Mr. Babcock the first time with Mrs. Leonhardt. I was not present when she talked to Mr. Babcock in his office. I was present in court when she plead guilty.

Q. Will you tell the Court what questions were submitted to her by Judge Lederle, and what her answers were, to the best of your recollection?

A. As I recall, Judge Lederle did inquire as to whether or not she was represented by counsel, and subsequently he did inquire as to her plea, and she said—

Q. What did he ask her?

A. He asked her if she wanted to enter a plea of guilty.

Q. Did he ask her anything else before that question?

A. I do not have a complete recollection.

Q. You do remember that Judge Lederle asked her if she wanted to plead guilty?

A. To that effect, yes.

Q. And what was her answer?

A. That she did.

Q. Do you recall any other questions put to her by the Court?

A. As I recall, the Judge also asked if she were pleading guilty because she was guilty, and she responded in the affirmative.

Q. And any other question with regard to counsel?

A. I believe the Judge inquired whether or not the plea of guilty was upon the suggestion of any Government agent. I believe my recollection is that. And Mrs. von Moltke said no.

Q. Did she sign a waiver? Did you see what she signed at that time?

A. I have no independent recollection of Mrs. von Moltke signing any document or paper at that time.

Q. Were you in court at the time she entered the plea of guilty?

A. Yes, I was; I believe at the back, or to the side of the court room. I was not at her side, or in front of the court room.

Q. Well, after she was led out of the court room, did you at any time hear her state to any of the agents that she thought she had made a mistake in pleading guilty?

A. Not until sometime, as I recall, after the first of the year. I did not talk to her further on that day. I did not hear her make any such statement on that day. She did not request any leniency as a consideration for her plea. She was not promised any leniency at any time by me or anybody else in my presence to induce her to plead guilty. As I recall, it took approximately 10 or 15 minutes for her to get in the court room and enter her plea.

Cross Examination

By Mr. Field:

I am an accountant by profession. I was an accountant when I became associated with the Federal Bureau of Investigation. Principally I was assigned to the interrogation of Theresa Behrens who was a cellmate of Mrs. von Moltke at the Wayne County Jail. Emma Leonhardt was also in the same cell. All of our conversations with Theresa Behrens would not naturally be in the presence of Mrs. Leonhardt and Mrs. von Moltke. The cell block was probably a quarter of a block long, and there were individual cells running up the side, and Mr. Dunham and myself generally would talk with Mrs. Behrens for some time, and upon completion of our conversation with her we did on a number of occasions talk with Mrs. von Moltke and Mrs. Leonhardt. Those conversations principally related to Theresa Behrens, although on the one instance I do recall that the question of publicity was raised by Mrs. von Moltke, and similarly was an interest of Theresa Behrens. I do not recall that I made any statement to Mrs. von Moltke, or Mrs. Behrens, or Mrs. Leonhardt, in the presence of von Moltke, that other defendants were pleading guilty.

Q. (By Mr. Field) You have testified that Mrs. von Moltke commented on the adverse publicity in connection with this case, and the charges made against her, haven't you?

A. Yes, sir.

Q. And did she ask you that if all the other defendants pleaded guilty whether she would have the right to a trial?

A. I believe she did ask me that question on one occasion.

Q. And did you answer that question?

A. To the best of my recollection, my answer was that the question of the trial would be up to the United States Attorney's Office.

Q. And didn't you tell Mrs. von Moltke that you knew

of no reason why she should not be tried without the others?

A. Possibly I did, yes, sir.

Q. Did Mrs. von Moltke express concern for her husband, her child or children to you, and the effect of her predicament upon them?

A. Yes, I believe she did make comments in that regard..

Q. And did she tell you that she was hoping to do whatever would be best for her husband and her child?

A. Yes, I believe she did say that.

Q. Did Mrs. von Moltke ask you whether a plea of guilty on her part would result in her husband losing his job?

A. As I recall, Mr. von Moltke at that time was suspended by Wayne University, and I think if I recall correctly the point of Mrs. von Moltke's inquiry to me on that was whether or not a plea of guilty on her part would bar Mr. von Moltke from being re-employed, or having his suspension cut off.

Q. What did you answer to that, Mr. Kirby?

A. I believe I told her that was a matter, as far as her husband was concerned, between the University and himself, and the question of her plea was one that she had to decide, based upon her own feeling of guilt or innocence.

Q. I see. And did Mrs. von Moltke ask your advice regarding the indictment?

A. No, sir.

Q. Did she discuss the indictment with you?

A. Prior to the time that she plead guilty, I would say no, sir.

I have been having some difficulty to recall whether I was in the rear of the court room, or to one side at the time Mrs. von Moltke pleaded guilty. I cannot recall seeing Mr. Hanaway there. Mr. Collard was there, I believe. I cannot recall anyone else. I have no definite recollection as to whether or not Mr. Dunham was there on that day or not. Mr. Babcock was there. He was immediately before the bench, and I believe Mrs. von

Moltke was standing in the front of the court room also. Mr. Collard was before the court, also, as I recall. I recall no discussion particularly concerning Mrs. von Moltke's eyesight.

Q. What did Judge Lederle say with respect to there being an attorney in the case who had entered an appearance, if you recall?

A. The extent of my recollection there is principally that he inquired if counsel was present for her, and I recall nothing further, nothing that would indicate anything further along that line.

Q. How long did the discussion between Mr. Babcock and Judge Lederle concerning the attorney in the case take, to the best of your recollection?

A. A matter of not more than five minutes.

Q. And were you there at the beginning of the proceedings, that is to say, did you get there before Mrs. von Moltke went before the court?

A. Yes, I believe I did.

Q. And you stayed until it was ended. Is that correct?

A. I returned to the FBI office on the 9th floor immediately after her plea was entered, and accepted.

E. BERT COLLARD, JR., was thereupon called as a witness on behalf of the Respondent, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Fordell:

I was employed by the Federal Bureau of Investigation in the year of 1943 during the time the proceedings initiated against the petitioner in this case were in progress. I did not at any time make any promises to her to induce her to plead guilty in this case, or exact any conditions as a basis for her plea of guilty.

Q. Did she at any time ask you for advice in the matter?

A. Yes.

Q. Did you know whether she had an attorney or not?

A. I knew that an attorney had visited her, yes, sir.

Q. Did she ever discuss with you as to whether she should have an attorney or not? Or let me withdraw the question, and put it this way: Did she ever request to you that an attorney be retained for her?

A. No, sir.

Q. Did she ever state to you whether she wanted an attorney or not?

A. As I recall it, she said that she did not want an attorney.

Q. Did she make that statement on more than one occasion?

A. Yes, as I recall it, she did.

Q. How often would you say?

A. As I recall, I only saw Mrs. von Moltke twice before she plead guilty, and I think on both of those occasions she mentioned something about the attorney.

Q. Well, did she ever ask you whether she should plead guilty or not guilty?

A. Yes, I believe that she did ask me that question.

Q. More than once?

A. Yes, I believe on both the occasions that I talked to her.

Q. And what did you say to her about that?

A. I told her that was a matter strictly for her, and for nobody else.

Q. And what did she say?

A. I just cannot remember what answer she made.

Q. Well, tell us what conversations you had with her during this time—conversations in which the word "attorney" was mentioned?

A. As I recall it, to the best of my ability, now, Mr. von Moltke wanted Mrs. von Moltke to have an attorney. In fact, he went so far as to send one or two gentlemen over to see her. But in all the conversations that I had with Mrs. von Moltke concerning the attorney, it was her idea that she did not want an attorney, and that she wanted to just go ahead without an attorney, and do whatever she was going to do without one.

I was not present when she was taken to the Marshal's office, and where Mr. Babcock talked to her, but I was present the second time on October 7, 1943 when she was brought into Mr. Babcock's office. As I recall, I talked to Mrs. von Moltke at her request on October 2, and October 4, of 1943. Right now I cannot remember why she came over on October 7, but there was either a call from the Marshal's office, or a call from the matron, over at the County Jail. As you recall, she was the Marshal's prisoner, and was not a prisoner of the FBI. It has been so long ago I don't remember whether I went upstairs on the 6th floor; that was the women's cell, and talked to Mrs. von Moltke before she came down to get in the car to come over to the Federal Building, or whether I just sat in the car and the Marshal went in to get her. She was being taken to Mr. Babcock's office because she had stated she wanted to enter a plea in the case. There was, I am sure, quite a lengthy discussion there in Mr. Babcock's office between him and Mrs. von Moltke, the gist of which I cannot remember what was said, and who said what. But I know that Mrs. von Moltke said that she wanted to plead guilty. She did not state to Mr. Babcock at that time that she wanted to plead guilty, even though she was not guilty. I am absolutely positive of that. She did not state to Mr. Babcock that she wanted to plead guilty to cooperate, nor did she at any time tell me that she wanted to plead guilty in order to cooperate with the government. She told Mr. Babcock she wanted to plead guilty, as I understood it, because she was guilty. That was the reason she came over there. She did not express any conditions on which she based her plea of guilty. Mr. Babcock said that Judge Moinet, the Judge that was handling the particular case, was indisposed for one reason or another that particular day, and it would be a lot more convenient maybe to wait until another day to enter a plea, but she said not, that she was over there that day, and she wanted to enter it right then, so he said that probably arrangements could be made with some other judge to accept her plea of guilty. Mr. Babcock told Mrs. von Moltke that the plea

of guilty would be accepted only on the basis that she was guilty. That is just all there was to it. Then Mr. Babcock made the arrangements, and we proceeded down to Judge Lederle's court.

Q. Do you recall what questions Judge Lederle put to her?

A. I know he asked her a number of questions. I just cannot recall now.

Q. Can you recall what some of those questions were?

A. Oh, yes, I think Mrs. von Moltke mentioned this afternoon that he asked her if she was guilty because she was guilty, and she said she was, and asked her if any threats or promises had been made to her, and she said no. He asked her if she understood the nature of the charges against her in the indictment; as I remember, he had an indictment there. She said that she did.

Q. Did he ask her anything else?

A. As I remember, he went to considerable pains to ask her the questions that he should have to guarantee the rights that she had, and to convince himself, since he was not the judge handling the case, and I think he told her then before she ever plead guilty, I believe, one of the things he said was, if he would accept her plea, and if the case would be referred to Judge Moinet for sentence, and that he would have nothing to do with it.

Q. Did he ask her whether she wanted counsel or not?

A. Yes, as I remember he did.

Q. And what did she say?

A. She said no, she did not.

Q. After she was led out of the court room, did she at any time while being taken up to your office, or to the county jail, indicate to you, or to anyone else in your presence, that she felt that she had made a mistake in telling Judge Lederle that she knew what the charges were, and that she was guilty?

A. No, she did not.

Q. There has been some testimony here that she requested you to explain this indictment to her.

A. Yes.

Q. Did you try to explain it to her?

A. Yes, as I remember, I did.

Q. Did you know whether she had read the indictment at that time?

A. Yes, I am sure she had.

Q. What did you tell her?

A. The first time that I talked to Mrs. von Moltke was October 2. She could not correspond with our office, but she would tell the matron, and the matron would call our office, or the Marshal's office, and I know on this particular day I received a call that Mrs. von Moltke would like to see me in the county jail, and I went over to see her.

Q. Well, in explaining this indictment to her, what explanation did you give her?

A. I just tried to explain it the best I could.

Q. You read the indictment to her?

A. She had read it. She had her copy of the indictment, and had the various counts that pertained to her, she had those circled; I tried to discuss them with her.

Q. Was that afterwards that you told her to see her attorney as to what she should do?

A. As I recall, I told her that she could see an attorney at any time, that that was her privilege, as I recall it.

Cross Examination

By Mr. Field:

(Whereupon a paper was marked Petitioner's Exhibit No. 1.)

I am an attorney. I have practiced law. At no time was I a district attorney in Texas or in any way connected with law enforcement agencies in Texas. I practiced law in Texas. I as a member of the Texas bar, and the Kansas bar. In 1943 I was working for the FBI. I don't know whether I was in principal charge of the case against Mrs. von Moltke. That was my job. I arrested her on a presidential warrant and Mr. Hanaway and I examined her for four days following her arrest. I was not present when the indictment was served upon Mrs.

von Moltke. I saw her, I believe, on October 2 after she had received the indictment.

Q. What, if anything, did you say to Mrs. von Moltke to indicate to her that the indictment was a new proceeding?

A. Was a what?

Q. A new proceeding, and not a continuation of the presidential arrest?

A. Would you kindly ask that again? I do not quite see what you are trying to get at, sir.

(Question read.)

A. As I recall it, when I first went over to the County Jail at Mrs. von Moltke's request on October 2, she had the indictment, and I explained to her that she had been indicted by the Federal Grand Jury, and I explained to her that technically she had been re-arrested on that indictment, and she told me that she had been arraigned; I found out about that, too. I was not present at the time. So if that is what you mean by "new procedure," I did tell her that.

Q. And did she say that the indictment puzzled her?

A. I don't know as she said it puzzled her, but she wanted me to discuss it with her, which I proceeded to do.

Q. And did you bring over a copy of your own?

A. I am sorry; I could not tell you whether I did.

Q. In your direct examination you said Mrs. von Moltke had her copy.

A. It seems to me that she did, yes.

Q. And did you have your copy?

A. Well, now, I am sorry, I could have had, and I could not have had. I just do not remember. I am sorry.

Q. Where did you talk with Mrs. von Moltke in the County Jail about the indictment?

A. As I remember, the matron gave us her little office there to discuss whenever we talked.

Q. And about how long did that discussion take?

A. I imagine several hours. You just cannot talk to Mrs. von Moltke for a few minutes. It is always a several-hour proposition.

Q. Mr. Collard, I will show you a number of papers stapled together here, marked Petitioner's Exhibit No. 1, and I will ask you if that is the copy of the indictment that Mrs. von Moltke had at the time you discussed this matter with her on October 2, 1943, at the Wayne County Jail?

A. I am sorry, I see nothing on there that I could identify that by.

Q. You are unable to say?

A. I am unable to say if that was her's or mine or whose it is.

Q. Well, does that appear to be a mimeographed copy of the indictment in Mrs. von Moltke's case?

A. Yes; I mean that is what the printed matter says, so I am sure that that is what it is.

Q. You have seen this before, haven't you?

A. I have seen several of the indictments, yes, sir.

Q. Well, you stated on your direct examination, I believe, that Mrs. von Moltke had some of the paragraphs of the indictment circled. Do you recall that as a fact?

A. I was trying to testify only to facts.

Q. I mean, do you now recall that as a definite fact that you definitely remembered?

A. I definitely remember that she had some mark of some type indicating the ones that had her name mentioned in them; whether it was circled, or a parenthesis, or how it was, I do not just remember, but I know there was some distinctive mark made.

Q. Did you explain to Mrs. von Moltke the nature of a conspiracy?

A. I attempted to, yes.

Q. To the best of your ability?

A. Yes, sir.

Q. And did you spend some time on that particular phase of your explanation?

A. I do not recall, but we probably did.

Q. And did you during that discussion use a illustration about a rum runner?

A. Well, I heard Mrs. von Moltke say that, and since she did I have been trying to recall, and I cannot remember such an illustration.

Q. I see.

A. But it is quite possible that Mrs. von Moltke's memory is better than mine, and I may have used such an illustration.

Q. And did you question Mrs. von Moltke at that time concerning the charges that were made against her in this indictment?

A. No, not question her concerning those; I did not believe it necessary; we had done all of that prior, and had a signed statement from her of twenty some odd pages.

Q. 17, wasn't it?

A. It could be. I do not just remember.

Q. Did you ask Mrs. von Moltke whether she was questioned with Carlos Galino DaSilva?

A. On which occasion?

Q. On October 2.

A. I don't remember; but I am sure that I probably did not.

Q. You did not?

A. I know that we discussed that from October 24 to October 25, 26 and 27.

Q. You don't mean October?

A. I mean August; during the time we questioned Mrs. von Moltke we talked about—

Q. But you did not talk about Mr.—I don't know whether he is Mr. or not, but DaSilva with Mrs. von Moltke on October 2, 1943, that you remember?

A. I just cannot say one way or the other, whether we did, or whether we did not. I do not recall.

Q. Did you in any way explain, or attempt to explain to Mrs. von Moltke the meaning of the word "feloniously"?

A. I cannot remember her asking that, but if she did ask me, I probably tried to explain it to her; but whether that was one of them, I just don't remember.

Q. And are you familiar with the definition of a felony under the federal law?

Mr. Fordell: Well, I don't think this questioning now is material in this case, what he is familiar with.

The Court: I think not. There is no testimony that she asked that. If there were, then you might be permitted to ask him if he knew, but this is not an occasion to get the witness' general knowledge of the law.

Q. (By Mr. Field): Did Mrs. von Moltke ask you the difference, or to define the difference between a combination, a conspiracy, and a confederation?

A. I am sure I don't know whether she asked me such a question or not.

Q. You don't recall that?

A. No, I don't believe I do.

Q. Did you discuss with Mrs. von Moltke whether she introduced one Edward Arndt to Grace Buchanan Deneen?

A. This is on the occasion of October 2?

Q. October 2, 1943.

A. I will have to answer that by saying that if that is one of the Overt acts involving Mrs. von Moltke, then I did discuss it with her.

Q. And did you explain to Mrs. von Moltke the nature of an Overt act?

A. Well, if she asked me, I probably tried to, but whether she asked me or not I just don't remember.

Q. And did Mrs. von Moltke ask you whether merely conferring with people who later turned out to be guilty of criminal acts would also make her a criminal, and guilty of criminal acts?

A. I do not just recall that particular question. It is quite possible.

Q. As the final result, Mr. Collard, of your conference with Mrs. von Moltke, at the County Jail on October 2, 1943, did you come to any conclusion about what she should do or what she should not do?

A. No.

Q. With reference to the charge?

A. No.

Q. Did you indicate to her one way or the other what would be the proper course for her to pursue?

A. No, I did not.

Q. (By Mr. Field): Do you recall making an affidavit

in connection with Mrs. von Moltke's attempt to withdraw her guilty plea?

A. Yes, I did.

Q. And do you remember stating in that affidavit that Mrs. von Moltke asked you if she could make a statement at the time sentence would be imposed upon her, and that you advised her that she would have an opportunity at the time sentence was imposed to make a statement to the court, and that thereafter she began to prepare a lengthy statement which she apparently intended to make to the court at the time of imposition of sentence. Do you recall making that statement?

A. I take it you have just read that from the affidavit?

Q. Yes, sir, I have.

A. If it is in the affidavit, it is a statement I made, yes, sir.

Q. And do you recall specifically now the incident where you advised her that at the time of sentence should would have an opportunity of making a statement to the court?

A. Well, I am sure that I must have said that, if I made that affidavit to that effect. I am sure that that is what I said to her, yes, sir.

Q. But do I understand you to say now that you have no independent recollection of it now other than the fact that you did make the statement in an affidavit?

A. Well, I may have the independent recollection now, and I may not. I have read that affidavit since I arrived back here, and that has kind of helped to refresh my memory on it, if that is what you mean. I may not quite understand your question. Is that what you mean?

Q. Yes, sir. Now, you mention also in your affidavit that Mrs. von Moltke discussed with you her desire to change her plea of guilty, and that you advised that it was her privilege to do so, and informed her of the proper way to get in touch with the United States Attorney?

A. Yes.

Q. You did that, didn't you?

A. Yes, sir, I did that.

Q. And you told her that was her privilege to change her plea?

A. Yes, I certainly did.

Q. (By Mr. Field): At the time that Mrs. von Moltke appeared before Judge Lederle, do you recall a discussion between Judge Lederle and Mr. Babcock regarding the fact that an attorney had filed an appearance for Mrs. von Moltke and Mrs. Leonard in the case?

A. I am sorry, but I just do not recall that.

Q. You do not recall that?

A. It has been discussed here, and I am sure probably took place, but that happens to be one of the things I just cannot remember at all.

Q. And do you confirm the fact that there was a trial in process at the time that it was interrupted for this plea to be made?

A. Yes, I have a little different idea as to what kind of a trial it was, but I know there was one.

Q. Was it a so-called Jehovahs witness trial?

A. No; it was a trial concerning a white Russian sect, that grew long whiskers and long hair, and came in to defend themselves.

Q. And were there quite a few people in the court room?

A. It was not jammed, packed, but there were a number of people there, yes, sir.

Q. Well, how, one other question, Mr. Collard; you say in your affidavit, and I will read this now as follows:

"That as far as this deponent is informed and believes, her action in entering a plea of guilty to the indictment on October 7, 1944, was her free and voluntary act made after due consideration with a full and complete understanding of the charge made against her in the indictment in the instant case."

Is that correct?

A. Yes, sir.

Q. And when you say "full and complete understanding of the charge made against her in the indictment",

do you refer to the fact that you explained the indictment to her?

A. I simply refer to the fact that as far as I knew and could understand, she understood thoroughly what the whole thing was all about, yes, sir.

ROBERT S. DUNHAM, a witness called on behalf of the Government, after being first duly sworn, testified as follows:

Direct Examination

By Mr. Fordell:

I was employed by the Federal Bureau of Investigation during the year 1943 and had occasion to talk to the Petitioner in the Wayne County Jail while the prosecution was pending against her. I didn't question her regarding her implication or not implication in the case. It was more of a friendly visit. During the times I talked to her I did not make any promises of any kind to her to induce her to plead guilty to the charges pending against her. I talked to her from the time she was incarcerated in the County Jail from the early part of September I think it was, 1943, until along in March, 1944. I visited her and talked to her approximately twenty times maybe, more or less. Prior to the time she entered a plea of guilty, my purpose in visiting the Wayne County Jail was the interrogation of Theresa Behrens, another defendant in this case. During the visits, at the conclusion of the questioning of Mrs. Behrens, I used to become engaged in conversation with the three female prisoners there, among whom was the Petitioner, and I talked with her I imagine four, five or six times prior to her entering a plea of guilty. On one of the early visits, after the indictment had been delivered to her, she made an inquiry of me as to the nature of the charges or what I understood them to be. At that time I told her I couldn't explain the indictment to her or talk to her about it, that I would advise her to discuss the matter with an attorney. Then I asked her if she had an attor-

ney. I knew at that time Mr. Okrent had visited the jail. She told me she had discussed this with an attorney. She told me her husband was very determined she should have an attorney, that she should not plead guilty without the advice of an attorney. In my discussion with her, from the statement made to me by her, she told me it was a problem she wanted to decide herself. She didn't feel that discussing the matter with Okrent or any other attorney would be of much assistance to her, because her consideration was not only for herself, but for her husband and family. I don't know how many times her husband visited her, but I do know a number of times I talked with her, she seemed concerned over the fact that each occasion it was discussed while with her husband—she said it was an unpleasant visit and she didn't look forward to the part of the visit when they told her he wanted her to have an attorney, because he wanted her to have advice before she did anything. She was determined in her own mind to make up her own mind, as she told me.

Q. Did you bring her husband to the Federal Building on the occasion when she was brought to the United States Marshal's office with Mrs. Leonhardt?

A. Yes, when she was brought to the marshal's office with Mrs. Leonhardt, and she was in the Marshal's office when they arrived and talking, both of them, and both stated they were over here to plead guilty. Mrs. von Moltke said she would like to talk with her husband before she decided to do anything. I had talked to her in the jail and I knew her husband's interest in the matter, and I knew how she felt about it and I told her I would get her husband and she could talk to him before she entered a plea of guilty. I went to the establishment where her husband was working and notified them of her desire, and they in turn passed the word along to him. He came over to the Marshal's office and talked with her. I wasn't there with her when her husband came in. The Marshal made arrangements to talk to her husband alone. When she returned to the place where Mrs. Leonhardt was she said, "I have decided to plead guilty." I don't

know whether it was at that time Mrs. Leonhardt said, "I am going to plead guilty any way," or whether it was before that, but Mrs. Leonhardt entered a plea of guilty, and Mrs. von Moltke was returned to the jail.

Cross Examination

By Mr. Field:

I made an affidavit in answer to Mrs. von Moltke's plea to withdraw her plea of guilty in August of 1944. At that time these matters were quite a bit fresher in my mind than they are now.

Q. I want to call your attention to one paragraph which I will read from your affidavit: "That Deponent," meaning you, "has no recollection of said Defendant," meaning Mrs. von Moltke, "ever saying to him—between October, 1943 and Christmas of 1943, that she was changing her plea to one of guilty in order to avoid a trial and the consequent newspaper publicity." Do you recall making that statement in your affidavit?

A. I must have made it; I recall that is the affidavit. You see, I talked with her on a number of occasions after she had entered a plea of guilty, and she was concerned about newspaper publicity, but I don't recall that she ever made a direct statement of that kind to me.

Q. Mr. Dunham, did Mrs. von Moltke ever express to you a concern about her husband losing his job?

A. Yes, she did.

Q. Did Mrs. von Moltke ever express to you a concern over the welfare of her diabetic son?

A. She did to the extent—I wouldn't say I took a personal interest, but I took an interest to the extent I made arrangements for the son to be cared for.

Q. Was this before the plea of guilty?

A. Yes, she did.

Q. You were aware of the fact weren't you, Mr. Dunham, that after Mrs. von Moltke was arrested, that Mr. von Moltke was doing what he could to take care of the child?

A. Yes. It was my understanding that the boy—at the time of her arrest, during the early time of her incar-

ceration in the jail, when I talked with her, the boy was in a home of friends of theirs, but something transpired there and they didn't wish to care for the boy and they had to place him somewhere.

Q. Did Mrs. von Moltke convey to you the idea that if her husband lost his job as a result of newspaper publicity in connection with this case, that that would affect the welfare of the child, and caused her concern?

Mr. Fordell: I object to it. I don't think she was excited about her family or personal matters—personal matters of her own have no bearing.

Mr. Field: As to whether she waived her right to counsel intelligently. Everybody that is incarcerated have something to be excited about.

The Court: It may be answered.

Mr. Field: Would you repeat the question, Mr. Reporter.

(Question read.)

A. She was fearful unless—

Mr. Fordell: Was there a ruling?

The Court: I said it may be answered. You have referred to it a good many times. When did her husband lose his job?

Q. (By Mr. Field) Do you know, Mr. Dunham?

A. I don't know. He was suspended, as I recall it, a few days to a week after her arrest, and suspended pending the outcome, but I don't know when they definitely told him his services were no longer required.

Q. (By Mr. Field) Did Mrs. von Moltke express to you her belief that her husband would be unable to get another job if he lost the job at the Wayne University, if the publicity continues?

Mr. Fordell: I object to the question.

The Court: Objection sustained.

Mr. Field: Exception. I think that goes to the very heart of this matter.

The Court: All right, you have your exception. Go on with the questions.

Q. (By Mr. Field) Well, what then before the plea

of guilty seemed to bother Mrs. von Moltke, other than the concern about publicity?

Mr. Fordell: I object to that. She might have been concerned about a lot of things. The only important thing is knowingly and intelligently pleading guilty to the charges pending against her at that time. She may have done that in spite of the fact she was concerned about many other things.

The Court: This is undoubtedly true. I assume anyone in jail is disturbed about their family affairs. It isn't extraordinary, but a most human condition. Undoubtedly she was disturbed, as anyone under like circumstance would be. It is not at all abnormal. I have allowed you to go into that a great deal, describing the conditions that existed. In the case in which a woman is incarcerated and charged with a crime, if she didn't worry over the consequences of her act, it would be utterly inhuman. It isn't extraordinary, anyone out of the ordinary routine of life, to react in that manner. You have already made quite an extensive record on that, so don't go into that any more.

A. I visited Mrs. von Moltke at the County Jail five or six times between the time she was arraigned on the indictment and the time she pleaded guilty. Mrs. von Moltke was endeavoring to get advice or information from me, or opinions, and yet she realized I couldn't give her opinions, but she tried in the best way she could to get some idea. I am not a lawyer. I have not had legal training. I have had legal training with the Federal Bureau of Investigation and I know something about criminal laws and criminal procedure. Mrs. von Moltke knew I was with the FBI. I don't know what else she thought.

Q. Was the fact discussed that others indicted in connection with these charges had pleaded guilty, or were going to plead guilty, on your visits with Mrs. von Moltke?

A. Mrs. von Moltke and the other two women prisoners in the jail were allowed to read the newspapers and whatever periodicals they wanted. They avidly read every newspaper which at that time carried news of what legal

processes were in order and what the newspapers speculated on, and on the basis of that she made many insinuations.

Q. And those facts reported in the newspapers, concerning her case, were discussed with you?

A. Yes, sir.

Q. In your presence?

A. Yes.

Q. You were asked certain questions by Mrs. von Moltke and the other women in the cell block?

A. That is right.

Q. Did Mrs. von Moltke ask you what her chances were in case she went to trial in this case?

A. Yes, she did.

Q. Did you advise her on that?

A. I told her I couldn't give her any answer. She went so far as to ask me if I could cite a similar case and advise her what the outcome was and I told her I could not.

I was not present at the time a member of the Federal Bureau of Investigation explained the indictment to her or at the time any agent of the Federal Bureau of Investigation explained or attempted to explain the indictment to Mrs. von Moltke. I read the indictment when it was prepared and after it was returned.

Q. Did you discuss with Mrs. von Moltke the particular so-called overt acts in which her name was mentioned?

A. When you say the word "discussed", that is a big word, it covers a lot of territory. She mentioned to me overt acts which she was involved in, four or five, whatever it was.

Q. Did she ask you whether in your opinion the statement in those paragraphs of the indictment made her guilty of conspiracy?

A. No.

Q. Did she ask you for an illustration of a similar case which might be helpful to her?

A. Yes.

Q. Did you give her one?

A. Let me change that to say that she didn't ask for an illustration as a similar case concerning the indict-

ment, it was a general over-all picture of what the effect would be and I told her I couldn't give her one.

Q. What was the principle purpose of your visits to the County Jail after Mrs. von Moltke was arraigned and before she pleaded guilty?

A. We were at that time very much interested in information which Mrs. Theresa Behrens had, which had not been fully revealed to us, and my purpose in the visits was to talk to Mrs. Behrens.

Q. Did you talk to Mrs. Leonhardt also?

A. Yes.

Q. Did she plead guilty?

A. Yes.

Q. Did Mrs. Behrens plead guilty?

A. Yes.

Q. Did you discuss with Mrs. von Moltke the possibility or probability of Dr. Thomas pleading guilty?

A. I believe she asked me on a number of occasions in that regard. I believe she asked me if I knew whether Dr. Thomas would plead guilty or not, and I told her no, because I didn't know.

Q. Did you get the impression that Mrs. von Moltke was looking for help and information?

A. My impression was that Mrs. von Moltke asked me, and the manner in which she did, that she realized that I couldn't give her an answer, and she didn't want to embarrass me to the extent to ask me direct questions. I told you I finally came out and told her she should discuss this with an attorney, and she told me her husband sent Mr. Okrent. My impression of Mrs. von Moltke was that she was endeavoring to make up in her own mind what was the best thing to do, and didn't wish to discuss the matter with either her husband or the attorney.

Q. Why was it, Mr. Dunham, then that she insisted on seeing her husband on the first day she went to Mr. Babcock's office?

Mr. Fordell: I object to that as a conclusion.

The Court: Objection sustained.

Q. Were you present at the time when Mrs. von Moltke was arraigned, Mr. Dunham?

A. Yes. With Mrs. Leonhardt.

Q. That arraignment took place before Judge Moinet?

A. Yes.

Q. Did Mrs. von Moltke have an attorney at that time?

A. An attorney was appointed in Court at that time.

Q. Was there a trial in progress at the time Mrs. von Moltke came into Judge Moinet's court room?

A. I don't recall.

I was present in Mr. Babcock's office the time Mrs. von Moltke's husband was there and she decided not to plead guilty. I was not there on October 7, 1943. I was standing almost outside of the rear door of Judge Lederle's court room when Mrs. von Moltke pleaded guilty. I could see Mr. Collard standing beside her. That is the only other agent I saw. I was notified that Mrs. von Moltke was pleading guilty and that was how I happened to be in the court room.

Q. Did Mrs. von Moltke ask you whether if all the other defendants in this case pleaded guilty, that she would still have the right to have a trial?

A. She may have asked me that. I don't have a definite recollection, but she might have.

Q. Did you imply or suggest to Mrs. von Moltke that the Government had a very strong case against her?

A. No. I particularly avoided discussing that with Mr. Von Moltke. I avoided discussing her involvement in this, because it was not my responsibility or concern.

Q. Did you advise or suggest to Mrs. von Moltke that public feeling was running high in connection with the cases in which she was involved?

A. No.

Q. Did you advise or discuss with Mrs. von Moltke probation procedure?

A. She inquired of me one time, and I don't recall when this was, what the Probation Office was and what the Probationary officers did, and I believe I told her that the Probationary Officers conducted an investigation into her life and made a recommendation concerning his findings prior to sentence.

Q. Did you also give advise or discuss with Mrs. von Moltke the fact, if it was a fact, that she could in that manner bring to the attention of the Court any matters that she might wish to regarding involvement in the case?

Mr. Fordell: I will object to that.

The Court: Objection sustained.

Mr. Field: Exception.

The Court: Of course, if you know anything about the routine of probation, that is exactly what is done among innumerable other cases. The Court gets a statement of what the particular Defendant has to say about the charge.

Mr. Field: I am aware of that.

The Court: Her case would not have been any different.

Mr. Field: In this case we are attempting to show that Mrs. von Moltke was trying to tell that she was not guilty, even though she pleaded guilty, and through the probation officer was the only manner in which she could bring that to the attention of the Court.

Q. (By Mr. Field) Did you discuss with Mrs. von Moltke, or answering questions that she might have asked you, anything regarding immigration or deportation?

Mr. Fordell: I object to it, Your Honor. I don't think it is material in this case.

The Court: Well, go ahead and answer it.

A. Yes. She asked if I thought she would be deported at the culmination of these proceedings, whatever the outcome might be, and I told her that to the best of my knowledge the Immigration and Naturalization authorities would make that decision.

Q. Did you tell her the procedure by which that decision was reached?

A. No.

Q. Did you advise her that the Immigration Board has some discretion in matters of that kind?

A. No. I was not familiar with the proceedings myself.

Q. Did Mrs. von Moltke question you about her chances in case she was sentenced to prison, of being sent to a nearby prison?

A. I don't know whether she questioned me. I knew that at one time, when she was considering entering a plea of guilty, that that is one of the things she was concerned about.

The Court: We have gone into that.

Mr. Field: Not with this witness.

The Court: I know, but you are not going into the same thing with every witness. That is a very usual request. I have had it thousands of times. Naturally people want to be near their families. People who are to be incarcerated make that request to the Court. The Court has not anything, in itself as a Court, to say where they should go. He can make recommendations to the Attorney General's Office as to where the prisoner might go, and they usually comply with our request. That it was made is nothing unusual. Naturally people want to be near their families. So, don't go into that.

Q. Now, getting back to the discussion you had with Mrs. von Moltke about the effects of the publicity, or the possible effects of newspaper publicity attendant upon a trial, did she advise you that she wanted to avoid that if possible?

A. Yes. But not necessarily. I would like to clarify that. It was not necessarily the trial, but any specific legal action. It was just the general publicity that hurt her deeply.

Q. Did you get the impression that she was sensitive to publicity?

Mr. Fordell: I object to that. It is immaterial in this case whether she was sensitive or not. In this case it is whether she plead guilty on that particular day and whether she did it knowingly.

The Court: The objection is sustained.

Mr. Field: May I have an exception.

Q. (By Mr. Field) Now, Mr. Dunham, in the affidavit which you filed in answer to Mrs. von Moltke's leave to withdraw her plea of guilty appears this language, that nothing was ever said to said Defendant, Mrs. von Moltke, by this Deponent, yourself, or by any other said Agent of the Federal Bureau of Investigation, who ac-

accompanied him, that this Defendant's refusal to plead guilty would result in her being the only Defendant to pass trial, and that nothing was ever said to this Defendant by this Deponent as to the consequent newspaper publicity attendant upon the trial. Do you recall making that statement?

The Court: Why do you ask it?

Mr. Field: I am asking that because I want Mr. Dunham to—

The Court: Do you ask it for the purpose of impeachment? There is no contradiction in what he says on the stand.

Q (By Mr. Field) Do you recall making that statement?

A. Yes.

Mr. Fordell: I object to the question. I don't know the purpose of it. I don't think it is material in this case.

The Court: I don't think it is for the purpose of impeachment. There is no contradiction. You haven't told me yet, Mr. Field, what the purpose is.

Mr. Field: The purpose is to present to Mr. Dunham the apparent inconsistencies in his testimony.

The Court: There must be inconsistencies if you are presenting it for the purpose of impeachment. On the stand he has told what the Petitioner has said. Have you read the affidavit correctly? I have never seen it. He is saying what he said or didn't say. In the paragraph you read a moment ago—

Mr. Field: Let me ask Mr. Dunham a question.

Q. (By Mr. Field) Did you discuss with Mrs. von Moltke about newspaper publicity?

The Court: What do you mean by "discuss"? He said she asked certain things concerning it, and made certain statements concerning it. That is not a discussion. A discussion implies that both sides are taking part in talking about that topic.

Mr. Field: That is what I meant by discussion, both parties participating in talking.

The Court: All right.

Q. (By Mr. Field) Did you discuss that with her?

A. I wouldn't say that I discussed it with her, and as I recall it her concern over publicity, and what was evident of this concern to me, occurred after, and occurred at the time Dr. Thomas was being tried, which was January, 1944, which was long after she entered a plea of guilty.

JOHN W. BABCOCK called as a witness on behalf of the Government, after being first duly sworn, testified as follows:

Direct Examination

By Mr. Fordell:

I was employed as Chief Assistant United States Attorney during the year 1943. I had charge of the investigation and return of the indictment, the matter of any pleas that were tendered and the final trial of Dr. Thomas in connection with the prosecution of petitioner and others. I had occasion to talk to the Petitioner in this matter. The first time I talked to her was on the day that Mrs. Leonhardt tendered the plea of guilty to the Court. Just the exact date, I don't remember. The conversation took place in the office of the United States Marshal, on the 9th floor of this building. My memory is not clear whether it was on that occasion, or on the occasion of the second conversation in my office that Mrs. von Moltke presented to me three conditions about which she was concerned. In the office of the United States Marshal she was resolving in her mind the question of whether she should or should not plead guilty, and finally advised me that her then decision was not to plead guilty. I had another conversation with her subsequently. As I say, either in the Marshal's office or in my office she said to me that she was concerned about the possibility of being deported at the conclusion of serving a term in a penitentiary. She was concerned about the possibility of newspaper publicity, and she was concerned about where she might be incarcerated. She wanted to know if I could assist her in keeping down newspaper publicity, if I could assist her in being incarcerated somewhere near Detroit,

and if I could assist her in remaining in this country. I told her that under any circumstances anything I might reply to her questions must not have any bearing whatsoever upon her decision to plead guilty or not plead guilty; that she would have to decide that for herself, on the basis of whether or not in her own conscience she had to say that she was guilty. I said nothing further about those conditions to her at that time. Later in that conversation she announced to me that her decision was to plead guilty. I then recounted to her the normal procedure in the court room, telling her that when you appear before one of the United States District Judges, the Judge would ask if she was tendering her plea as a result of any promise made to her, whether it was a result of any threats upon her or whether it was because she was guilty. That he would also ask her if she desired to have counsel appointed to advise her, and after I completed that explanation to her she said she had decided to plead guilty and shall I make arrangements to take her into the court room. Thereupon, after she had announced that decision to me, I told her then that so far as her problem of newspaper publicity was concerned that I could do nothing about it, that I had no control over the newspapers. So far as deportation was concerned, I could do nothing about that, because that is a question for the Immigration and Naturalization Service to determine, jurisdiction over which I had no connection. That so far as the place of incarceration was concerned, while I couldn't control that in any manner, I would, if she requested, write a letter of recommendation that her place of incarceration be near Detroit where her family might see her.

She did not at any time say to me "I wish to plead guilty in order to cooperate" or that she wanted to plead guilty even though she wasn't guilty. If she had done so I would not have taken her into the court room to make such a plea. Subsequently we proceeded to Judge Lederle's court room.

Q. Will you tell the Court what questions were submitted to her by Judge Lederle at the time she entered her plea of guilty?

A. I must say that I have no distinct recollection of those questions. Of course, I have in mind the normal procedure that is followed by every one of our very careful United States Judges, but for me to testify to that as a distinct recollection, I couldn't say.

Q. What is the normal procedure Judge Lederle and the other Judges follow?

A. I do recall distinctly on this occasion when Mrs. von Moltke had previously been arraigned, and without aid and advice of appointed counsel, stood mute, it was necessary the procedure be a motion to change her plea, and when Judge Lederle advised us he was ready to give this matter attention, I recall I informed the Court that this Defendant wished me to make a motion to change her plea from that of not guilty to guilty. Thereupon I recall the Court proceeded in the normal way. Now, the normal procedure is for the Court to ask the Defendant if the information given to the Court is correct, if the Defendant desires to plead guilty, and ask the Defendant if such plea of guilty is tendered by reason of any promises made to the Defendant, if such plea of guilty is made by reason of any threats made upon the Defendant, if such plea of guilty is their voluntary plea and made because the Defendant is guilty and if the Defendant desires to have counsel appointed by the Court. First of all, if the Defendant has counsel of his or her choosing, and if not, if the Defendant desires counsel appointed by the Court to advise the Defendant in connection with the matter. Upon being satisfied that the action tendered by the Defendant is free and voluntary, without promises or threats of any kind and because the Defendant is guilty, the Court will then accept the plea of guilty and proceed with further disposition of the case.

Cross Examination

By Mr. Field:

Q. Did Judge Lederle make any comment about the fact the file showed an appearance had been entered for Mrs. von Moltke and Mrs. Leonhardt?

A. I don't remember, sir.

Q. You don't recall a discussion between you and the Court concerning such an appearance?

A. No, I don't.

Q. Do you recall Judge Lederle at the beginning of those proceedings, that is, the proceedings that culminated in the guilty plea, stating that he couldn't accept the guilty plea unless the attorney was present?

A. No, I don't recall that.

Q. You don't recall any colloquy between you and the Court on that point?

A. No.

Q. Was there any court reporter in the court room at that time?

A. My memory is that there was.

Q. Do you remember whether there was a case in progress in Judge Lederle's court room when you first went into the court room?

A. I don't think so, Mr. Field. As I recall it, it was at recess time. I do not remember whether Mr. Collard was with me or Mr. Dunham or Mr. Kirby or Mr. Hanaway. I hope you realize, Mr. Field, that at this particular time we were involved in the problem of a large number of Defendants in this case, and there were a large number of Agents working on the case, and that is why I answer you—I do recall that there were Agents of the Federal Bureau of Investigation there, but to identify them, I can't do that. Mrs. von Moltke did not tell me that she had discussed the indictment with an agent of the Federal Bureau of Investigation prior to the time she came to my office nor did she tell me that she was advised by one of the Agents of the Federal Bureau of Investigation as to what the charges were. Petitioner's exhibit No. 1 appearance to be a mimeograph copy of the indictment to which Mrs. von Moltke plead guilty. I participated in its preparation but I didn't sign the exhibit. I signed the original indictment filed with the Court. I am aware of the fact that these charges are grounded upon a charge of conspiracy.

Q. (By Mr. Field) When Mrs. von Moltke was in your office, did you confer with her on October 7, 1943, prior to appearing before Judge Lederle, and did you dis-

cuss with her, or did she request information from you regarding paragraph 24, of the so-called overt acts, set forth in the indictment, that reads as follows: "That on or about December 20, 1941, in pursuance of said conspiracy and to effect the object thereof, Theresa Behrens, Grace Buchanan Dineen, and Marianna von Moltke met and conferred at 4553 Seebaldt Avenue, Detroit, Michigan."

A. I didn't discuss that with her and she didn't request information or advice of me in this connection.

Q. Did you discuss with Mrs. von Moltke at that time—

The Court: Ask a general question. Did you discuss with the Petitioner at that time any specific paragraphs of the indictment?

A. I did not, Your Honor.

The Court: Then you don't need to go into detail on it.

Q. (By Mr. Field) Did Mrs. von Moltke ask your advice as to what constituted a conspiracy?

A. No, sir.

Q. Did you voluntarily give information on that?

A. No, sir.

Q. Did Mrs. von Moltke ask you to explain the word "feloniously?"

A. No, sir.

Q. Or the words, "combine or conspire or confederate?"

Mr. Fordell: The witness testified that the petitioner didn't ask for any advice.

The Court: Didn't you say you did not discuss the indictment with the Petitioner, Mr. Babcock?

A. Yes, Your Honor, I did say so.

Mr. Fordell: I believe the record shows she didn't request any advice.

The Court: All right, go ahead.

Q. Do you recall Mrs. von Moltke signing any paper at the time she was before Judge Lederle?

A. As a matter of definite recollection, I do not, Mr. Field.

Q. Do you recall that Mrs. von Moltke said to you that the reason she was appearing there was because she

didn't want to go to trial and she therefore had to sign the waiver which she signed at that time?

A. Mrs. von Moltke didn't say that to me.

Q. I asked whether you recall that she said that to you?

A. If Mrs. von Moltke said that to me I would have recalled it. My answer is she didn't make any such statement to me.

Q. What statement did she make regarding the waiver?

A. None whatsoever, sir.

Q. Did she read it?

A. She appeared to be reading, as far as my observation could determine.

Q. Mr. Babcock, do you recall a visit to your office by Mr. Hanaway prior to October 7, 1943, and subsequent to October 1, 1943, or around October 3rd?

A. I recall that one of the Agents of the Federal Bureau of Investigation—whether it was Hanaway or not, I don't know—came to my office a few days prior to the time I saw Mrs. von Moltke in the Marshal's office.

Q. And did he have a message for you from Mrs. von Moltke?

A. He reported to me a conversation he said he had with Mrs. von Moltke.

Q. And what was that report?

A. He advised me that in a conversation with Mrs. von Moltke, she had expressed three conditions which gave her some concern in relation to her consideration of the question of whether she should change her plea to guilty. The three conditions being, namely, the matter of the newspaper publicity if she should plead guilty, the matter of her deportation consequently to serving a period of incarceration and the matter of the place of her incarceration, whether she might be close to Detroit.

Q. What did she want from you, Mr. Babcock?

A. I don't know.

Q. What did Mr. Hanaway say she wanted?

A. He didn't say she wanted anything. He was reporting to me a conversation.

Q. What did you tell the Agent?

A. I told the Agent that I could make absolutely no promises or assurances of any kind whatsoever.

Q. Did you tell the Agent to report that to Mrs. von Moltke?

A. No, sir.

Q. When Mrs. von Moltke asked you about the possibility of not being deported, did you tell her that the matter was entirely under the jurisdiction of the Immigration Department?

A. Yes, the Immigration and Naturalization Service.

Q. Did you advise her it was also under the jurisdiction of the Department of Justice?

A. I said in the hands of the Immigration and Naturalization Service of the Department of Justice.

Q. Did you consider in the discussion with Mrs. von Moltke the fact that she had been arrested on a Presidential Warrant?

A. No, sir. Pardon me. It may be, Mr. Field, that I was present during the hearing by the Alien Enemy Hearing Board when Mrs. von Moltke appeared before that board. Now, I am not just sure what the question means. When you say did I discuss with her the arrest on a Presidential Warrant. If I was present at the Alien Enemy Hearing Board, undoubtedly I questioned Mrs. von Moltke for the benefit of that Board.

Q. Was Mrs. von Moltke represented by an attorney at that time?

A. At the Enemy Alien Board?

Q. Yes.

A. No, sir.

Q. Was there any reason for that?

Mr. Fordell: I object to that. It is immaterial in this case.

The Court: Objection sustained.

Mr. Field: Exception.

Q. Did you point out to Mrs. von Moltke that there was a difference in the proceedings instituted in connection with a Presidential Warrant and the proceedings that came with the indictment?

A. At what time?

Q. At the time you spoke to her in your office, the day on which she pleaded guilty?

A. No, sir.

Q. Or prior thereto?

A. No, sir.

(Petitioner's Exhibit 1 was received in evidence.)

Q. Mr. Babcock, this is Petitioner's exhibit No. 2, bearing a waiver signed by Mrs. von Moltke, and I will ask you to look at it and say whether or not you can identify it?

A. What do you mean, identify it. You have just said it is a waiver that she signed. Is there any further identification you wish?

Q. Do you so identify it?

A. I don't know Mrs. von Moltke's signature. I assume it bears the signature—

Q. Do you have any independent recollection of Mrs. von Moltke signing this paper when she appeared before Judge Lederle?

A. I have an independent recollection that she signed a waiver to a right of counsel. I presume that is the document.

Q. Do you recognize Judge Lederle's signature?

A. Yes, sir.

Q. Does it appear on this exhibit?

A. Yes, sir.

Q. Did you prepare the phraseology on this particular form of waiver?

A. No, sir.

Q. Did you explain to Mrs. von Moltke the meaning of the words in this waiver: "Having been asked by the Court whether I desire counsel to be assigned by the Court, I hereby, in open court voluntarily waive and relinquish my right to be represented by counsel at the trial of the cause."

A. Did I explain those words?

Q. Yes.

A. No, sir.

Q. No explanation was given of the meaning of this waiver, is that right?

A. No. I don't say that is correct. Judge Lederle was extremely careful and meticulous to make sure, as he always does, that she understood what she was doing.

Q. Did Judge Lederle interrogate her or discuss with her the meaning of this waiver?

A. He interrogated her as to whether she wished to have counsel represent her and advised her as to signing a waiver of that right. Again, Mr. Field, I hope you understand, and I wish to say again that I have no distinct recollection now—let me put it this way: if any of our Judges have missed doing that, I would have remembered that very distinctly.

Q. Do you recall whether Mrs. von Moltke raised any question about the words in this waiver, that she had a right to be represented by counsel at the trial of the case?

A. I do not recall, no, sir.

Q. You do not remember Mrs. von Moltke stating that she didn't want a trial of the cause?

A. I do not, no, sir.

(Petitioner's Exhibit 2 was received in evidence.)

GRAFIN MARIANNA von MOLTKE having been previously duly sworn, was recalled and testified further as follows:

Re-Direct Examination

By Mr. Kronner:

Q. Did you ever have any dispute with your husband prior to your plea of guilty concerning the employment of counsel?

A. No.

Q. From the time you were arraigned before Judge Moinet on the 21st of September, to the 28th of September, when you went to Mr. Babcock's office, had you seen or visited with your husband?

A. I saw him in the Marshal's office on the 28th of September.

Q. Was that the first time you had seen him or talked to him from the time of your arraignment?

A. Yes. Excuse me. I had not seen him. I had not

seen my husband the last time before I was arraigned. He didn't know I was to be arraigned. He didn't know where I was.

Q. How long before you were arraigned did you see him the last time; before you were arraigned?

A. The last time before I was arraigned, to my recollection, was around the 20th of September.

Q. And from the 20th of September—then you were arraigned on the 21st?

A. Yes.

Q. And taken to the County Jail?

A. Yes.

Q. Where were you when the indictment was served on you?

A. At the Immigration Detention Home.

Q. I believe that Mr. Collard testified that on the 2nd of October he explained to you that the indictment was a different proceeding than the Enemy Alien Proceedings. Was that the first time you knew the difference?

A. Mr. Collard never said such a thing to me. Mr. Collard never explained that.

Q. When was the first time, if ever, that you knew there was a difference between the indictment with a conspiracy charge and the Enemy Alien Proceedings?

A. I didn't know, Mr. Kronner—I didn't know there was a difference.

Q. Did you have funds to hire an attorney.

A. No.

Mr. Fordell: I object to that.

A. Definitely not.

The Court: It will stand.

Mr. Kronner: There was testimony here that she didn't want an attorney. This goes to the very heart of this case, as to whether she was represented by counsel or whether she was denied the assistance of counsel.

The Court: You didn't understand what I said. That is what the Court asks a Defendant, just as Judge Lederle and just as Judge Moinet did, and that is have they funds with which to hire an attorney. If they say no, the Court says he will furnish counsel.

Mr. Field: If the Court please, I don't believe there is any testimony that Judge Lederle asked the question in this case.

The Court: I don't know whether there is testimony or not, but he drew attention to the fact that there was an attorney's name entered in the case, and he discussed it then. There is no question about that.

Q. (By Mr. Kronner) Did you have funds to hire an attorney?

Mr. Fordell: I object to that. It isn't material.

The Court: She may answer.

A. No. My husband had no funds to hire an attorney.

The Court: What did your husband earn?

A. \$35.00 a week.

The Court: Was he an instructor at the University?

A. He was dismissed.

The Court: I asked you what his salary was. What was his salary at the University?

A. Four thousand dollars.

The Court: And then when he was suspended he got a job that paid him \$35.00 a week, is that correct?

A. That is correct, Your Honor.

Q. (By Mr. Kronner) Did Judge Moinet tell you in open Court, at the time of the arraignment, that he would appoint an attorney for you?

The Court: You went over that repeatedly. It is on the record again and again.

Mr. Kronner: I am leading up to a question.

The Court: Don't lead up to it, ask it.

Q. (By Mr. Kronner) When he promised an attorney for you, or the attorney that was promised by Judge Moinet never came to you, what opinion did you form as to whether you were entitled to an attorney?

Mr. Fordell: I object to this question, because part of it is testimony on the part of the counsel, and it is asking for a conclusion.

The Court: Objection sustained.

Mr. Field: If the Court please, what the Petitioner is trying to prove is that she understood that as an enemy alien she wasn't entitled to an attorney, and when the

Judge told her she was, she believed that the Judge didn't know she was an enemy alien—

The Court: I don't know of any testimony to show that Judge Moinet didn't know what he was doing.

Mr. Field: No, Your Honor—

The Court: Objection sustained.

Mr. Field: Exception.

Q. After the visit of Mr. Okrent and Mr. Bricker, did you understand that they would represent you as a result of that visit?

A. No.

The Court: She testified to that before. This record is unduly long. Please don't make it too repetitious.

Mr. Kronner: No, your Honor. May I inquire whether you object to our inquiring as to her understanding as to the appointment of an attorney by Judge Moinet, as to whether she was entitled to an attorney or not?

The Court: You may ask her if you wish. It is already in evidence that Judge Moinet didn't tell her she wasn't entitled to it. In fact he was obliged to. There is no misinterpretation about that.

Mr. Kronner: No, but the misinterpretation came, Your Honor, when she understood she was to get an attorney and none appeared, and I think it is important that we should know her understanding about that.

The Court: Did she expect an attorney and did an attorney come? You may ask her those questions, though I think they are in the record in several forms.

Mr. Kronner: May I ask her then what conclusions she reached—

The Court: No, that is a matter of your argument, if there be an argument. I doubt very much if there will be if you keep on repeating the testimony.

Q. (By Mr. Kronner) By the way, Mrs. von Moltke, during the time you were testifying last evening, were you aware of anybody in the court room making signals to you?

A. No.

Mr. Fordell: I object to that—

The Court: I don't care whether she is aware or not.

Someone was making signals. That is what the Court spoke about. Whether she saw it or not, I don't know. I saw it.

Mr. Kronner: I think it is important to know whether she did.

The Court: How is it important? As I repeat again and again, there is no jury. You are conducting this case as if you had to impress a jury.

Q. (By Mr. Kronner): When was the first time you found out that the conspiracy case on the indictment was a different proceeding than the Enemy Alien Proceeding?

Mr. Fordell: I object to that.

The Court: Answer it. When?

A. I didn't find it out. I was not aware of different proceedings.

The Court: Now, I wouldn't go into that because she testified she read the indictment very carefully. Any other witness?

Mr. Kronner: That is all, Your Honor.

OPINION

(Filed April 24, 1946)

In the petition filed in this cause the petitioner directly or by implication charges that the District Attorney having the case in charge and agents of the Federal Bureau of Investigation mislead her or made promises to her that, which at least some degree, influenced her action in pleading guilty to the charge. I am of the opinion that these charges have now been abandoned by the petitioner but for the purpose of the record I wish to state most vigorously that there was absolutely nothing in the testimony sustaining such charges or implications. The conduct of both the officials of the District Attorney's office and the agents of the Federal Bureau of Investigation were meticulous in safeguarding the rights of the petitioner and that the record is utterly bare of any support of petitioner's contentions.

The petitioner is a woman obviously of good education and above the average in intelligence. Her knowledge of English was fluent and ample. She had discussed the case with various people before the plea of guilty was entered. In fact, at her own request, she had a conference with the chief assistant district attorney wherein she endeavored to secure from him some promises of leniency and convenience as an inducement to a plea of guilty. These advancements by the petitioner were, of course, repudiated by the district attorney and she was informed of the officials who had jurisdiction over the matter in advent of her plea of guilty.

The chief contention of the petitioner was that her waiver of her right to counsel was not competently and intelligently made. The plea was taken before Judge Arthur Lederle of this District. The evidence showed that the Judge inquired of her if she understood the charges made in the indictment. She answered in the affirmative. The Judge inquired if she desired the assistance of counsel. She answered in the negative. The Judge then inquired what was her plea. She answered guilty. In addition to this she submitted a signed waiver stating that she did not desire counsel.

A judgment cannot be likely set aside by collateral attack even by habeas corpus. In such circumstances it carries with it a presumption of regularity (*Franzeen vs. Johnston, Warden, 111 Fed. 2nd, 1817*). At page 1819 in the above citation the court said "The mere, bald assertion (*es-parte Deatherage, et al., 9th Cir., 98 Fed. 2nd, 793*) by a confessed criminal without corroboration (*Harpin vs. Johnston, Warden, 9th Cir., 119, Fed. 2nd, 434*), that he had been denied counsel is overcome when the allegations of the petition are met and controverted by the affidavits of court officials present at the time defendant's pleas were entered on them, to the effect that it was the uniform practice of the court, never known by the affiant to have been departed from, that the judge without exception would apprise all defendants appearing without counsel of their right, if without funds, to have the court appoint counsel for them and that the defendant

after having the indictment read admitted that he understood the nature of the charge therein contained and pleaded guilty, and at no time made a request for the assistance of counsel. * * * When we say the burden of proof rests with petitioner to establish that he did not completely and intelligently waive his constitutional right to assistance of counsel, we mean that petitioner must make a showing sufficient to overcome the presumption of regularity which attaches to a judgment of a court. The contention here made does not carry with it such a quality of proof. Moreover, we do not hold that the records of the trial court must show that the defendant was offered the assistance of counsel and that he refused (although this would be the better practice), such holding would be shifting the burden of proof from the petitioner to the court upon a mere assertion of the petitioner. The defendant could have refused the court's offer of counsel and that fact still not appear of record. We also take cognizance of the fact that the appellant pleaded guilty in both instances—he admitted commission of the crimes of which he was charged, and it is not asserted in the record that he was unable to understand the charges. Moreover, we do not lose sight of the important distinction between a plea of guilty and not guilty; a layman who pleads his innocence would be put to disadvantage in attempting to conduct his own defense and should have assistance whether he is able to pay for it or not; but the man who pleads guilty, admits he has no defense to make."

Judge Phillips of the Tenth Circuit Court of Appeals, in *Buckner vs. Hudspeth*, Warden, 105 Fed. 2nd, 396, 397 Certiorari, 308 U.S. 553, 60 S.Ct. 99, 84 L Edition—said "The constitutional right of the accused to have assistance of counsel may be waived. The burden rests upon petitioner to establish that he did not competently and intelligently waive his constitutional right. The determination of whether there has been an intelligent waiver of the right to counsel depends upon the particular facts and circumstances in each case, including the background, experience and conduct of the accused." *Johnson vs. Zerbst*, 304 U.S., 458, 464, 468. "Waiver of the right will

ordinarily be applied where the accused appears without counsel and fails to request that counsel be assigned to him." Other citations in harmony with the above are *Towne vs. Hudspeth*, Warden, 10th Cir., 108 Fed. 2nd, 676, 677; *McCoy vs. Hudspeth*, Warden, 10th Cir., 106 Fed. 2nd, 810, 811; *Wilson vs. Hudspeth*, Warden, 10th Cir., 106 Fed. 2nd, 812, 813 and *Harpin vs. Johnston*, 109 Fed. 2nd, 434, 9th Cir.

It is the further contention of petitioner that she could not plead guilty and waive right to counsel without legal advice. If such a proposition were true then no one could waive their constitutional rights. An argument similar in character to this put forth by the petitioner was reviewed and refuted in *Adams vs. U.S.* 317, U.S. 269. On page 272 the Court said: "The short of the matter is that an accused, in the exercise of a free and intelligent choice and with the considered approval of the court, may waive trial by jury, and likewise may be competently and intelligently waive his constitutional right to assistance of counsel. There is nothing in the constitution to prevent an accused from choosing to have his fate tried before a judge without a jury even though in deciding what is best for himself he follows the guidance of his own wisdom and not that of a lawyer. * * * It hardly occurred to the framers of the original Constitution and of the Bill of Rights that an accused, acting in obedience to the dictates of self interest or the promptings of conscience, should be prevented from surrendering his liberty by admitting his guilt. The Constitution does not compel an accused who admits his guilt to stand trial against his own wishes. Legislation apart, no social policy calls for the adoption by the courts of an inexorable rule that guilt must be determined only by a trial and not by admission. A plea of guilt expresses the defendant's belief that his acts were proscribed by the law and that he cannot successfully be defended. * * * And not even now is it suggested that a layman cannot plead guilty unless he has the opinion of a lawyer on questions of law that might arise if he did not admit his guilt. Plainly, the ingrafting of such a requirement upon the Constitution would be a gratuitous dislocation of the processes of justice."

Another statement of the law upon this point is contained in the case of *Dorsey vs. Gill*, 148 Fed. 2nd, CC of A, District of Columbia. The court stated that page 875 "In the second place there is no absolute requirement that a defendant be represented by counsel. An accused, in the exercise of a free and intelligent choice, and with the considered approval of the court, may competently and intelligently waive his constitutional right to the assistance of counsel. Hence, the mere fact that an accused was not represented by counsel is not in itself, alone, a sufficient basis for granting a writ."

The only substantial question in this case is whether the petitioner intelligently and knowingly waived her constitutional rights. It was her obligation to sustain the allegations of her petition by a preponderance of evidence. Not only has she failed in this but I believe that the evidence is overwhelming against her contentions. The petitioner is an intelligent, mentally acute woman. She understood the charge and the proceedings. She freely, intelligently and knowingly waived her constitutional rights. I conclude, therefore, that there is no merit in her petition and that it shall be dismissed together with the writ.

Ernest A. O'Brien,
United States District Judge.

Dated: April 24, 1946.

ORDER
(Filed April 26, 1946)

At a session of said Court held in the Federal Building, Detroit, Michigan, on the 26th day of April, 1946.

Present: The Honorable Ernest A. O'Brien, United States District Judge.

In this matter, the Court having duly considered the evidence produced by the respective parties herein and the Court having duly considered the briefs filed by counsel for said parties and the Court having rendered its opinion thereon.

It Is Hereby Ordered in conformity with said opinion that the Petition filed by the said Grafyn Marianna von Moltke and the Writ of Habeas Corpus issued by this Court be dismissed and that the said Grafyn Marianna von Moltke be remanded to the custody of the Superintendent of the Detroit House of Correction at Plymouth, Michigan.

Ernest A. O'Brien,
United States District Judge.

NOTICE OF APPEAL

(Filed June 18, 1946)

Notice Is Hereby Given that Marianna von Moltke (heretofore impleaded as Grafyn Marianna von Moltke) hereby appeals to the Circuit Court of Appeals for the Sixth Circuit from the final judgment and order entered in this action on April 29, 1946 dismissing writ of habeas corpus and remanding appellant to the custody of the Superintendent of the Detroit House of Correction.

Dated at Detroit, Michigan, June 18, 1946.

G. Leslie Field,
Attorney for Appellant,
2463 Penobscot Building,
Detroit 26, Michigan.

STATEMENT OF POINTS

(Filed June 18, 1946)

The points upon which appellant intends to rely on appeal are as follows:

1. The District Court erred in dismissing the writ of habeas corpus issued in this cause.

2. The District Court erred in failing to discharge petitioner at the conclusion of the hearing on said writ of habeas corpus.

3. The District Court erred in holding that petitioner had waived her right to assistance of counsel under the Sixth Amendment to the Constitution of the United States.

4. The District Court erred in holding that petitioner was not influenced, deceived and coerced into pleading guilty to a charge the nature of which she was unable to understand or comprehend by agents of the Federal Bureau of Investigation.

5. The District Court erred in sustaining an objection to the following question put to a witness for the government on cross examination:

"Q. (By Mr. Field) Did Mrs. von Moltke express to you her belief that her husband would be unable to get another job if he lost the job at the Wayne University, if the publicity continued?"

6. The District Court erred in sustaining an objection to the following question put to a witness for the government on cross examination:

"Q. Did you also give advice or discuss with Mrs. von Moltke the fact, if it was a fact, that she could in that manner (through the Probation Office) bring to the attention of the Court any matters she might wish to regarding involvement in the case?"

7. That the District Court erred in finding under the evidence that "The Petitioner is an intelligent, mentally acute woman. She understood the charge and proceedings. She freely, intelligently and knowingly waived her constitutional rights."

G. Leslie Field,
Attorney for Appellant,
2463 Penobscot Bldg.,
Detroit 26, Michigan.

STIPULATION RE COMPARISON OF RECORD

(Filed June 28, 1946)

It is hereby stipulated by and between the attorneys for the respective parties hereto that the Record on Appeal as printed be certified and transmitted by the Clerk of the United States District Court for the Eastern District of Michigan to the United States Circuit Court of Appeals for the Sixth Circuit without comparison.

G. Leslie Field,
Attorney for Appellant.
Vincent Fordell,
Attorney for Appellee.

Dated at Detroit, Michigan
June 28, 1946.

DESIGNATION OF RECORD

(Filed June 18, 1946)

Appellant designates the following portions of the record, proceedings and evidence to be contained in the record on appeal in this action:

1. Petition for writ of habeas corpus with attached copy of commitment.
2. Affidavit of Archie Katcher.
3. Affidavit of Harry Okrent.
4. Order to show cause dated February 7, 1946.
5. Order for writ of habeas corpus dated February 21, 1946.
6. Writ of habeas corpus dated February 21, 1946.
7. Answer to petition for writ of habeas corpus with attached exhibits A (copy of indictment) C (order allowing withdrawal of plea of not guilty and entry of plea of guilty) D (waiver of assignment of counsel: photostat to be included in record): E, F. and G (motion for leave to withdraw plea of guilty, affidavit in support hereof and order denying motion).
8. Appearance of Archie Katcher as attorney for Marianna von Moltke and another in connection with arraignment on indictment mentioned in paragraph 7 above.
9. Transcript of proceedings including testimony of witnesses Marianna von Moltke, Archie Katcher, Isadore A. Berger, Charles T. Hanaway, James H. Kirby, E. Bert Collard, Jr., Robert S. Dunham and John W. Babcock and evidence given before the Honorable Ernest A. O'Brien, District Judge, on March 11, 12, 1946, including Exhibits 1 and 2 which are the same as Exhibits A and D mentioned in paragraph 7 above.

10. Opinion of court filed April 24, 1946.
11. Order dismissing writ of habeas corpus and remanding petitioner to custody of Superintendent of Detroit House of Correction.
12. Statement of points on which appellant intends to rely.
13. Notice of appeal.
14. This designation.

G. Leslie Field,
Attorney for Appellant,
2463 Penobscot Building,
Detroit 26, Michigan.

CERTIFICATE OF CLERK

EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISIONS—SS:

I, George M. Read, Clerk of the United States District Court for said District, do hereby certify that the within and foregoing numbered pages contain a full and complete copy of all papers filed and all proceedings in said cause, in accordance with the designation of attorneys for appellant, as to contents of record on appeal, and in accordance with the stipulation entered into between attorneys for respective parties in said cause, waiving comparison by the Clerk of the record on appeal.

In testimony whereof, I have hereunto signed my name and affixed the seal of said Court at Detroit, this day of, 1946.

George M. Read,
Clerk, United States District Court,
Eastern District of Michigan.

By
Deputy Clerk.

PROCEEDINGS IN THE

United States Circuit Court of Appeals**FOR THE SIXTH CIRCUIT.**

CAUSE ARGUED AND SUBMITTED

(October 23, 1946—Before: ALLEN, McALLISTER and
MILLER, JJ.)

This cause is argued by G. Leslie Fields for Appellant and by Vincent Fordell for Appellee and is submitted to the Court.

JUDGMENT

(Filed March 10, 1947)

Appeal from the District Court of the United States for the Eastern District of Michigan.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Michigan, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

OPINION

(Filed March 10, 1947)

Before ALLEN, McALLISTER and MILLER, Circuit Judges. ALLEN, Circuit Judge. The appellant's petition for writ of habeas corpus, after full hearing by the District Court, was denied, and this appeal was instituted. The case arises out of the following facts:

The appellant, together with 23 others, was indicted for conspiracy with each other and with the German Reich to violate § 32, Title 50, U. S. C.

On September 21, 1943, the appellant was arraigned, and under advice of counsel appointed at that time by the court, she stood mute and a plea of not guilty was entered. On October 7, 1943, appellant waived her right to be represented by counsel and changed her plea of not guilty to guilty. The record presents a written waiver, which reads as follows:

"I, Marianna von Moltke, being the defendant in the above entitled cause, having been advised by the Court of my right to be represented by counsel, and having been asked by the Court whether I desire counsel to be assigned by the Court, do hereby, in open court, voluntarily waive and relinquish my right to be represented by counsel at the trial of this cause."

On August 7, 1944, the appellant filed a motion for leave to withdraw her plea of guilty on the ground that it was made "under circumstances of extreme emotional stress and during a time of extreme mental disturbance, without knowledge of her legal rights and without a thorough understanding of the nature of the offense charged. . . ." The motion was denied, on the ground that the appellant thoroughly understood the nature of the charge and changed her plea after due deliberation, and also because the motion was not filed within the period fixed by Rule 2(4) of the Rules of Criminal Procedure for withdrawal of pleas of guilty. The appellant then filed a petition for a writ of habeas corpus, which was dismissed by the District Court upon substantially the same grounds.

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A majority of the court holds that the judgment is valid and that the application for a writ of habeas corpus was rightly denied. The appellant was unquestionably under mental stress, which would be the case as to countless defendants accused of felony. The record shows, however, that she is extremely intelligent. She came to this country from Germany in 1927, has resided in Detroit since 1930, and for a foreign-born person she exhibits a remarkable command of the English language.

Appellant states that she read the indictment. She contends that she did not understand it; but the attorney appointed by the court to represent her at the time of the arraignment, who certainly is a disinterested witness, testified that she and her companion, Mrs. Leonhardt, also indicted under the same charge, led him to believe that they understood. He stated: "Well, I asked both of them; that is, both at once, whether they understood what this was all about. I believe that is quite similar to the language I used. And one or the other of them said, yes, they did understand, and the other indicated that she, too, understood. And then I asked if they felt that they were guilty or not guilty, and both indicated that they felt they were not guilty. I then rather hurriedly explained to them the advantage of standing mute as against pleading not guilty at that moment, and it was agreed that they would both be stood mute." Later the attorney reiterated that "they both indicated their understanding," and both indicated that they were innocent. Subsequently, upon September 25, 1943, appellant was questioned at length about the indictment by two attorneys sent by her husband. These attorneys informed appellant that they would not represent nor advise her. However, they were with her two and a half hours, and the testimony of one of them is as follows:

"Q. Your purpose was to discuss this case with her?

A. That is right.

"Q. And you did discuss this case with her? A. That is right.

"Q. You read the indictment at that time? A. Yes. I did; yes.

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"Q. Did you read it to her, to Mrs. von Moltke? A. I read parts of it. There were certain—she stated her story, and then I wanted to—well, it was a form of cross-examination. There were certain charges in the indictment, and I said, well, how about this? and then she gave me her answer to that.

"Q. You examined her insofar as the indictment affected her? A. Yes, sir.

"Q. So you covered the charges that were more or less directed toward her? A. Not—I may have, but not fully. I just picked up as I glanced through it. It was quite lengthy. And I glanced through it, and as I found something in there that pertained to her that I thought might be embarrassing to answer, I presented it to her to see what she had to say, and she gave me an answer.

.

"Q. But she did protest her innocence of the charges contained in the indictment? A. That is correct.

"Q. So part of the time that you spent with her was devoted to the discussion of this case? A. Well, it was all around the case, and the incidental phases of the case."

The second attorney did not testify in the case, due to illness. It is uncontradicted that these lawyers told appellant if she was guilty, to plead guilty, and if not, not to do so.

Appellant's own testimony contradicts her statement that she did not understand the charge. On cross-examination she testified as follows:

"Q. Mrs. von Moltke, when you were served with the indictment in this case, did you read it? A. I read it.

"Q. And after you had read the indictment, did you feel you were innocent of the charges that were stated in the indictment? A. Yes, sir, definitely so.

"Q. You did not feel you were guilty of those charges that you read in the indictment? A. I did not feel guilty of those charges in the indictment.

"Q. Then you knew what the charges were in the

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indictment. A. Oh, no, and so far I might explain that to you, I knew—

“Q. Just answer my question.

“The Court: Answer the question.

“A. Yes, I knew, not what the charges were, but I knew as I said before that I saw I was accused of something of which I was not guilty. That was how I understood that.

“Q. Well, you read the indictment. Isn't that right?

A. I read the indictment.

“Q. And you felt you were innocent of the charges that were described in that indictment? A. And the overt acts.

“Q. And the overt acts? A. Yes.

“Q. Do you recall how many overt acts you read in that indictment, approximately? A. Five.

“Q. Now, after you talked to Mr. Collard, did you still feel you were innocent of those charges? A. Yes, sir, because I told Mr. Collard so.

“Q. Regardless of what Mr. Collard told you, you still felt you were innocent of the charges in the indictment? A. Yes, sir.”

Appellant saw her husband twice a week between the time of arraignment, September 21, 1943, and October 7, 1943, when she withdrew her plea. He had a Ph.D. degree, and, as appellant said, “a certain amount of education in German law.” He repeatedly advised appellant not to change her plea, and told her to get a lawyer. She says that she did not know she was entitled to a lawyer; but on the other hand, she stated that Judge Moinet informed her that she was entitled to counsel. Officials of the F. B. I. told her the change of plea was a question for her or her attorney. They also told her that she should in no case plead guilty unless she was guilty. The appellant admits that no promises or threats were made to her. She stated on several occasions that she did not wish to consult a lawyer, but

desired to settle the matter herself. On her own initiative she sent the chief assistant district attorney, through an F. B. I. agent, a proposition to plead guilty to the indictment if the district attorney's office would agree to certain conditions: (1) that she be not deported; (2) that she be sent to some penitentiary near Detroit, and (3) that the newspaper publicity be stopped, because her husband had been an instructor at Wayne University. The assistant district attorney stated that he had no control over such matters, and could make no such agreement, but would recommend that if she pleaded guilty she be imprisoned near Detroit. When this was communicated to the appellant she indicated that she still desired to plead guilty.

When the appellant appeared in court to change her plea, the judge said he could not accept the change of plea because an attorney should be present. The case is sharply differentiated from *De Meerleer v. People of the State of Michigan*, 7 U. S. —, decided February 3, 1947. There "At no time was assistance of counsel offered or mentioned" to the seventeen year old defendant. Here the trial court proceeded on the application for change of plea to protect appellant's rights with meticulous care. Although it was explained that appellant desired to change her plea, the judge was not satisfied with reference to the question of the attorney. Appellant had already been informed by one judge that she was entitled to an attorney appointed by the court, and now a second judge put the specific question to her, whether she was represented by counsel, whether she wished counsel assigned by the court, and she said no. The judge inquired whether the plea was made on the suggestion of any Government agent, and appellant said no. He asked whether any threats or promises had been made to her, and she said no. He inquired whether the indictment had been explained to her, and she admits that she said yes. Her testimony in the habeas corpus proceeding, with reference to change of plea, continues as follows:

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"Q. Now, then, I ask you, had it been explained to you? A. No, it had not been fully explained to me.

"The Court: Well, you read it, didn't you? You seemed to remember about various paragraphs that cover the Overt Acts, and described them as 'Over' Acts. You had read it, had you not? The Witness: I had, your Honor.

"Q. Was there any further conversation between you and the Court? A. Judge Lederle said, 'And you plead guilty because you feel you are guilty?' and I said, 'Yes.'

"Q. At the time you gave that answer, was it true that you were pleading guilty because you knew you were guilty? A. It was not, because I pled guilty to cooperate."

The burden was on the appellant to establish as a matter of fact that she did not competently and intelligently waive the right to have assistance of counsel and that she did not understand what she was doing when she changed her plea. The trial court, who saw the witnesses, held that appellant did not sustain this burden, and a majority of this court agrees with that conclusion. We think the testimony quoted shows that appellant understood the charge, that she understood the consequences of pleading guilty, and that she waived the right to have counsel after long and deliberate consideration and full understanding that an attorney would be appointed for her without charge, if she desired; and with a complete understanding of what this attorney could do for her.

It is not the law that an accused cannot enter a valid plea of guilty without the assistance of counsel. As stated by the Supreme Court in *Adams v. United States*, 317 U. S. 269, 275:

"The short of the matter is that an accused, in the exercise of a free and intelligent choice, and with the considered approval of the court, may waive trial by jury, and so likewise may he competently and intelligently waive his Constitutional right to assistance of counsel. There is nothing in the Constitution to prevent

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an accused from choosing to have his fate tried before a judge without a jury even though, in deciding what is best for himself, he follows the guidance of his own wisdom and not that of a lawyer."

Also the motion to withdraw the plea was filed far too late, having been filed some ten months after appellant pleaded guilty. While the motion was made before sentence, it was not within the ten-day period fixed by Rule 2(4) of the Rules of Procedure for Pleas of Guilty, 18 U. S. C., following § 688.

The harshness of the ten-day rule is emphasized by appellant's counsel, who urge that appellant has a diabetic child, and necessarily was under great emotional disturbance during the period between arraignment and plea of guilty. A situation equally grave was presented in *Swift v. United States*, 148 Fed. (2d) 361 (C. A. D. C.), in which an appellant who had been advised that the strain of the trial would endanger her life, pleaded guilty to three indictments. A year after imposition of sentence she filed a motion to be permitted to change her plea. Her motion was supported by a physician's affidavit describing appellant as "suffering from one of the most dangerous heart conditions." The court held, notwithstanding, that the trial court was without jurisdiction to grant the motion.

To the same effect are *Hood v. United States*, 152 Fed. (2d) 431, 435 (C. C. A. 8), and *United States v. Achtner*, 144 Fed. (2d) 49 (C. C. A. 2). The latter decision declared that while this rule may be too harsh, it is the law applicable to cases of this kind. The rule has now been changed [Rule 32(d) of Rules of Criminal Procedure, effective March 19, 1946], but in its old form it is controlling here.

The judgment and sentence are valid, and the judgment of the District Court is affirmed.

Opinion

McALLISTER, Circuit Judge, dissenting:

On August 24, 1943, between 6 and 7 o'clock in the morning, six men came to the home of Marianna von Moltke, Appellant, in Detroit, Michigan. They were agents of the Federal Bureau of Investigation of the Department of Justice. Appellant's husband admitted them to the house, and they immediately went to her bed-room. She was in bed. One of the men thereupon arrested her and ordered her to go into the living room, which she did. She then dressed. The agent who ordered her to go into the living room had a presidential warrant for her arrest as a dangerous enemy alien. The various other agents asked permission of the husband to search the house, and were given such permission. Mrs. von Moltke was then taken by the government agents to the offices of the Federal Bureau of Investigation in the Federal Building, at Detroit. She was fingerprinted, photographed, and examined by a physician. She was then subjected to questioning by two agents of the Federal Bureau of Investigation from 10 o'clock in the morning until 8 or 9 o'clock at night. This questioning lasted for four consecutive days. During that time she was locked in a room and not allowed to see, or speak with, anyone except government agents. At the end of the fifth day of such imprisonment, she was released from the locked room and incarcerated in the Wayne County jail. During these five days she had not been allowed to see, or speak with, her husband, or anyone else.

Mrs. von Moltke came with her husband to the United States from Germany in 1926. Her passport discloses her title to have been Grafyn, or Countess, but she has never used that title in this country. Her husband Heinrich von Moltke was educated in Germany before the First World War, and obtained a degree of Doctor of Philosophy. He became a naturalized citizen of the United States in 1937. Mrs. von Moltke's application for citizenship was pending at the time of her arrest. Heinrich von Moltke had been employed as an instructor in the German language at Wayne University, in Detroit,

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at a salary of \$4,000 a year. Upon her arrest, he was immediately discharged from his position. He later got a job that paid him \$35.00 a week. No accusations have ever been made against him. Mrs. von Moltke at the time of her arrest was living with her husband and two of her children. The youngest child was then nine years of age, and suffered from diabetes. He needed constant supervision and attention. He required two injections of insulin each day, and a strict diet. She had to take care of the child constantly. Because of these circumstances she was under great nervous tension. After the second day of her arrest one of the government's agents secured permission to call her husband and related to her what her husband said about the child. Afterward, Mr. von Moltke placed the child with some of their friends, but they subsequently did not want to care for him, and he had to be placed with others. Mrs. von Moltke's social activities were limited to working for the Red Cross, membership in the Parent-Teachers Association, and volunteer social work with the Y. W. C. A. She had also engaged as a volunteer in the work of gas and sugar rationing for the government.

On September 1, 1943 Mrs. von Moltke was taken before an Enemy Alien Hearing Board. Up to this time she did not know why she was being detained; no charges had been made against her, and she had not been allowed to see an attorney. She was told that as an enemy alien she was not allowed to have legal counsel. Later, on September 18, the matron at the County Jail gave her a copy of an indictment against her. This indictment was for conspiracy to violate the Espionage Act.

On September 21, she was taken before the District Court, to plead to the indictment. She had no counsel, and had discussed the charges with no lawyer. The District Judge, finding that she was not represented by counsel, stated that she was entitled to legal assistance, and would have to have a lawyer to represent her. He then called some young attorney from a group sitting in the court room and told him to represent her. The lawyer

objected, and stated that he did not want anything to do with the case. The District Judge then assured him that it would be only for the arraignment. Upon this assurance, and without seeing the indictment or discussing it with Mrs. von Moltke, the attorney had a short whispered conversation with her and told her that if she felt she was not guilty, it was advisable to stand mute. She agreed to do so, and the attorney then informed the court that the prisoner was standing mute. A plea of not guilty was entered. The District Judge then stated that he would appoint an attorney for her right away, and she was taken back to the County Jail. No attorney came to see the Appellant, and no attorney was thereafter appointed for her.

The jail matron, upon Appellant's return to her cell, informed her that she had strict orders to keep her incommunicado. However, agents of the Federal Bureau of Investigation talked with her daily from then on until October 7. During that time Appellant was greatly worried about the possibility of being attacked by persons on her way to court, "to face a hostile public." She inquired of one of the agents of the Federal Bureau of Investigation: "Is it really so bad, that the public is so hostile?" . . . "If we go to Court, will we be bodily attacked?" She was told by the agent: "It is war time—you have to bear that in mind. Public sentiment grows from war hysteria. You don't need to be afraid; you will be protected." However, she testified: "But they left me with the thought that it is terrible to go to court and face a hostile public." Moreover, she had been told by one of the other prisoners, that unless she pleaded guilty, her husband would be involved and implicated in the criminal proceedings. She asked one of the agents whether that would be the case, and he told her that he could not answer that question.

Two lawyers called upon her at the jail during this period. They had been sent by Appellant's husband to talk to her, but they had not been retained as counsel. In fact, they told her that nothing she said would be

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held in confidence by them; and they afterwards advised her husband that they could not be connected with the case. At no time did they discuss her legal rights or advise her as to any course of action, or possible legal defenses, or explain the charges made against her. Mrs. von Moltke repeatedly asked the agents of the Department of Justice for advice as to whether she should plead guilty or not.

Later on Mrs. von Moltke had a talk with agent Collard of the Federal Bureau of Investigation. He told her that he was also a lawyer, and that he had been admitted to practice. He was the same agent who had arrested her, and who had interrogated her during the four days following her arrest. Mrs. von Moltke appealed to him to explain the indictment to her; and he consented not only to explain the indictment, but to advise her of the meaning of conspiracy. For this purpose, the matron at the jail gave them an office. The agent's explanation of the indictment and of the meaning of conspiracy lasted for several hours.

In dissenting from the views expressed in the accompanying opinion, I consider this interview and the agent's explanation to be the crucial and decisive feature of the case.

Mrs. von Moltke told the agent that she had never done any of "those things" that were designated as overt acts. "Mr. Collard explained to me that the 'Overt' Acts in the indictment do not mean the real thing. . . . Mr. Collard explained to me that the indictment doesn't cover the charge, and I seemed not to be able to understand, so Mr. Collard explained the indictment to me by an example, which he called the 'Rum Runners.' . . . That if there is a group of people in a 'Rum' plan, who violate the law, and another person is there and the person doesn't know the people who are planning the violation and doesn't know what is going on, but still it seemed after two years this plan is carried out, in the law the man who was present becomes . . . the person is guilty of conspiracy. And I said to Mr. Collard: 'If that is

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the law in the United States, I don't know how I ever can prove myself innocent, and how will any judge know how am I guilty if this is the law?' . . . Then I said: 'How will any judge know how to judge me like that, if one is innocent and the law is such and such?' And Mr. Collard told me about the Probation Department. . . . He explained to me that it is the duty of this office—the Probation Department—to collect the proper data and present it to the judge, so that the judge will know what to go by."

All of the foregoing testimony of Mrs. von Moltke on the hearing is undisputed. Mr. Collard was a witness, and on this phase of the case he testified as follows:

"Q. Did you try to explain it (the indictment) to her?

A. Yes, as I remember, I did. . . .

Q. Well, in explaining the indictment to her, what explanation did you give her?

A. I just tried to explain it the best I could. . . .

Q. Did you explain to Mrs. von Moltke the nature of a conspiracy?

A. I attempted to, yes.

Q. To the best of your ability?

A. Yes, sir.

Q. And did you spend some time on that particular phase of your explanation?

A. I do not recall, but we probably did.

Q. And did you during that discussion use an illustration about a rum runner?

A. Well, I heard Mrs. von Moltke say that, and since she did I have been trying to recall, and I cannot remember such an illustration.

Q. I see.

A. But it is quite possible that Mrs. von Moltke's memory is better than mine, and I may have used such an illustration. . . .

Q. Did you in any way explain, or attempt to explain to Mrs. von Moltke the meaning of the word 'feloniously'?

A. I cannot remember her asking that; but if she did ask me, I probably tried to explain it to her; but whether that was one of them, I just don't remember.

Q. And did you explain to Mrs. von Moltke the nature of an overt act?

A. Well, if she asked me, I probably tried to, but whether she asked me or not I just don't remember.

Q. And did Mrs. von Moltke ask you whether merely conferring with people who later turned out to be guilty of criminal acts would also make her a criminal, and guilty of criminal acts?

A. I do not just recall that particular question. It is quite possible."

From the record and the transcript of testimony we are constrained to conclude that Mr. Collard advised Mrs. von Moltke as to the indictment and the legal meaning of conspiracy, as she testifies. However, it can be said that Mr. Collard's obvious honesty and integrity in the matter is most commendable. Although he was mistaken in his advice to Mrs. von Moltke, he manfully declined, on the witness stand, any opportunity to shade, obscure, or to deny that he did give her such advice, either to excuse himself, or to defeat her contentions; and his conduct in this respect as an investigatory and law-enforcement official of one of the most distinguished branches of our government, is highly honorable, exemplary and worthy of praise.

Some days after her interview with Mr. Collard, Mrs. von Moltke decided to plead guilty, without consulting any lawyers other than the government agent. This action was directly contrary to the advice and wishes of her husband. She was taken before the District Court; she then withdrew her plea of not guilty, and entered a plea of guilty. The court asked her if she wished counsel, and she said that she did not. He further asked her if she was pleading guilty because she was guilty, and she answered in the affirmative. She signed a waiver of

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counsel, reciting that she had been advised by the court of her right to be represented, and had been asked whether she wished to have counsel assigned to her, but that she had voluntarily in open court waived and relinquished the right to be represented by counsel on the trial. She was then remanded to jail to await sentence.

Some months later, before sentence, she was advised that, in a criminal case, the accused was presumed to be innocent, and that if she had gone to trial, she would not have been obliged to prove herself innocent of the charges against her. She testified:

"I learned that in the United States, under the constitution, as a defendant you do not have to prove yourself innocent as in the European countries, that it is the task of the prosecuting attorney to prove you guilty. . . .

I first found that out on January—Monday, January 17, from Mr. Dunham (an agent of the Federal Bureau of Investigation). Mr. Dunham came up and we had a conversation on that. Mr. Dunham said it is true that in the United States, under the constitution, nobody is guilty until he has been proven guilty. That was the first time that I talked to Mr. Dunham about it. I asked again for Mr. Collard, to inform me whether this is my right; whether people who plead guilty are permitted in America to withdraw their plea. This was on January 6. After this we had several conversations. Mr. Dunham, on January 17, answered my question by saying that under the American constitution nobody is guilty until he has been proven guilty."

Color is given Mrs. von Moltke's contention in this regard, by reason of the fact that Agent Dunham was called by the government as a witness on the hearing on Appellant's petition, and he denied none of the foregoing statements.

Legal counsel thereafter retained for her then moved to withdraw her plea of guilty. This was denied by the

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District Court November 14, 1944, and on the same date, more than thirteen months after the entry of her plea of guilty, she was sentenced to imprisonment for a term of four years.

The undisputed evidence from the hearing before the District Court on Appellant's petition for a writ of habeas corpus clearly substantiates her claim that the chief reason why she pleaded guilty was because of the legal advice given to her by an agent of the United States government. This advice, from a man who was a lawyer, was, though honestly given, false. Believing that the information she received was true, and unquestioningly trusting in the honesty and integrity of the agent, Appellant was convinced that if it were proved that she had merely been present when acts of conspiracy, of which she had no guilty knowledge, were carried on, under the law, as explained to her, she would be equally guilty with the conspirators, and that she would have the burden of proving her innocence on a trial.

The indictment in its allegations of Appellant's participation in the conspiracy was in general terms. Out of 47 Overt Acts charged, Appellant was named in five, as follows: "In pursuance of said conspiracy and to effect the object thereof" she "met and conferred with" a certain woman on two occasions, and with the same woman and another on one occasion, and with these two and a third woman on another occasion; and that she introduced one Arndt to the first named woman on another occasion.

On the hearing of her petition for a writ of habeas corpus before the District Court, in response to questions by the trial judge, she unqualifiedly denied all knowledge of any conspiracy against the government, all charges that she had ever introduced an individual to an enemy agent as charged, or any knowledge that the woman whom she was accused of meeting with, was an enemy agent; and no proof was introduced by government counsel to the contrary.

The contentions that Appellant freely, intelligently,

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and knowingly waived her constitutional right to have the assistance of counsel in her defense, as guaranteed by the Sixth Amendment, and the contention that she was deceived by a government representative into pleading guilty and thus deprived of her liberty without due process of law, contrary to the guarantee of the Fifth Amendment, are inextricably bound together.

We can only conclude from the record before us that it was the false information and legal counsel given to her by the government agent as to what the charge of conspiracy embraced, and what the law of conspiracy provided, that induced Appellant to plead guilty. She relied upon this counsel, as coming from a lawyer, in whom she had confidence. Her waiver to the right of legal assistance arose out of her reliance upon such advice. If that advice had been correct, there would have been no presumption of innocence entertained on her behalf on the trial, and she would have had little chance, if any, to escape conviction. Prior to her sentence, she had never been advised as to her rights and as to the charges against her, except by the government agent. From the undisputed evidence in the record before us, I am of the opinion that Appellant clearly sustained the burden of establishing before the District Court that she did not competently and intelligently waive her right to counsel, and that she pleaded guilty because of the erroneous and false advice given to her, innocently enough, by the government representative. See *Waley v. Johnson*, 316 U. S. 101; *Walker v. Johnson*, 312 U. S. 275.

It is true, as stated in the accompanying opinion, that Appellant's previous petition to withdraw her plea of guilty was filed too late to permit of its consideration by the District Court, because of Rule 2(4) of the Rules of Procedure for Pleas of Guilty, then in effect and which has since been changed. Rule 32(d) of the Rules of Criminal Procedure, effective March 19, 1946. But we are here concerned not with the determination of Appellant's right to withdraw her plea of guilty, but with the allowance of her petition for a writ of habeas corpus, based upon denial of her constitutional rights.

Clerk's Certificate

In accordance with the foregoing a judgment should be entered setting aside the judgment heretofore rendered. The writ of habeas corpus should be granted and the Appellant remanded to the District Court for trial, on a plea of not guilty. 28 *USCA*, Sec. 461; *Johnson v. Zerbst*, 304 U. S. 458.

CLERK'S CERTIFICATE**UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

I, J. W. MENZIES, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in the case of *Marianna von Moltke v. A. Blake Gillies*, No. 10,307, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of said Court at the City of Cincinnati, Ohio, this 24th day of March, A. D. 1947.

J. W. MENZIES,

*Clerk of the United States Circuit Court.
of Appeals for the Sixth Circuit.*

(SEAL)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 2, 1947.

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(1466)

Supreme Court of the United States

OCTOBER TERM, 1946

No. 1285 73

MARIANNA VON MOLTKE,
Petitioner,

vs.

A. BLAKE GILLIES,
Superintendent of the Detroit House of Correction,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE SIXTH CIRCUIT
AND SUPPORTING BRIEF

G. LESLIE FIELD;
415 Dime Building,
Detroit 26, Michigan,
Attorney for Marianna von
Moltke, Petitioner.

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(e) Petitioner did not understand and was not advised concerning the nature or consequences of the "waiver" she signed as

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Supreme Court of the United States

OCTOBER TERM, 1946

No.

MARIANNA VON MOLTKE,
Petitioner,

vs.

A. BLAKE GILLIES,
Superintendent of the Detroit House of Correction,
Respondent

**PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE SIXTH CIRCUIT**

*To the Honorable Chief Justice and the Associate Justices
of the Supreme Court of the United States:*

Your petitioner respectfully shows:

I.

**SUMMARY AND SHORT STATEMENT OF
MATTER INVOLVED.**

This is a habeas corpus proceeding. On February 7, 1946 petitioner filed a petition for a writ of habeas corpus in the District Court of the United States for the Eastern District of Michigan, Southern Division (R. 1-7) alleging that she was unlawfully and unjustly imprisoned in the custody of respondent under an order of commitment issued by said court November 15, 1944 (R. 8, 9, 10) on petitioner's plea of guilty to a charge of conspiracy to violate Section 2 of the Espionage Act of 1917 (50 U. S. C. A., Sections 32, 34) pursuant to which petitioner was committed to prison for four years (R. 8, 9). Petitioner alleged that her restraint and imprisonment were illegal and in violation of Amendments V and VI of the Constitution in that

- (a) she was neither aware nor properly advised of her right to have the assistance of counsel for her defense, did not understandingly waive the same, and was not properly and effectively afforded the assistance of counsel for her defense in accordance with the intent and purpose of the VIth Amendment, and
- (b) she was deprived of her liberty without due process of law in that she was coerced, intimidated and deceived into pleading guilty to a charge of conspiracy to violate the espionage act notwithstanding her belief that she was innocent, contrary to the guarantee of the Vth Amendment (R. 2).

Respondent filed an answer to the petition in the nature of a general denial on information and belief (R. 17-19)

relying principally upon the record of conviction. Writ of habeas corpus was issued March 9, 1946 (R. 16) and a hearing on the issues raised was held in the District Court March 11 and 12, 1946 (R. 47-170). On April 24, 1946 the District Judge before whom the hearing was held filed a written opinion (R. 170-174) denying relief and ordering the petition and writ dismissed. On April 26, 1946 an order was entered in conformity with said opinion (R. 175). From this judgment petitioner appealed to the Circuit Court of Appeals for the Sixth Circuit (R. 175). There the case was argued and submitted on October 23, 1946 (R. 181) and on March 10, 1947 an opinion was handed down affirming the judgment of the District Court, one Judge dissenting (R. 182-198). Judgment was entered accordingly (R. 181).

Petitioner has been in custody since August 24, 1943, the date she was arrested on a presidential warrant as a dangerous enemy alien (R. 48). On October 7, 1943, under circumstances outlined in her petition for writ of habeas corpus (R. 1-7), petitioner signed a "waiver" of her right to be represented by counsel at the trial of her case (R. 36) and pleaded guilty to a charge of conspiracy to violate the espionage act. The indictment containing the charge consisted of 17 mimeographed pages and included 47 overt acts (R. 20-34), five of which (R. 29, 30, 31) name petitioner. Her subsequent attempts to withdraw the guilty plea and obtain a trial were unsuccessful (R. 46) and on November 15, 1944, almost 15 months after her arrest, her motion for leave to withdraw her plea was denied and she was sentenced to imprisonment for a term of four years (R. 8-9). She is still in prison.

BASIS OF JURISDICTION

Jurisdiction of this court is invoked under section 240 of the Judicial Code as amended, being section 347 (a), Title 28, U. S. C. A.

QUESTIONS PRESENTED

1. Under the evidence and proofs in the District Court, did petitioner as a matter of law and fact voluntarily, competently and understandingly waive her right to have the assistance of counsel in her defense as guaranteed by the VIth Amendment?

2. Did the Court of Appeals err in holding that petitioner had voluntarily, competently and understandingly waived her right to assistance of counsel in her defense?

3. Under the undisputed evidence and proofs in this case, was not petitioner coerced, intimidated and deceived into pleading guilty and waiving her right to the assistance of counsel by agents of the Federal Bureau of Investigation and thus deprived of her liberty without due process of law contrary to the provisions of the Vth Amendment?

4. Do the evidence and proofs in this case show compliance by the Government with the requirements of the Vth and VIth Amendments and observance of petitioner's Constitutional rights under said Amendments in connection with her conviction and sentence?

5. Did the Circuit Court of Appeals err in affirming the judgment of the District Court under the undisputed facts in this case?

REASONS RELIED ON FOR ALLOWANCE OF WRIT

1. The Circuit Court of Appeals has decided important questions of federal law in this case: to-wit, questions involving civil liberties arising under the Vth and VIth Amendments to the Constitution which have not been, but should be, settled by this Court.

2. The Circuit Court of Appeals has decided federal questions arising under the Vth and VIth Amendments to the Constitution in a way probably in conflict with applicable decisions of this Court. *Hawk v. Olson*, 326 U. S. 271; *Glasser v. United States*, 315 U. S. 60; *U. S. v. Adams*, 320 U. S. 220; *Walker v. Johnson*, 312 U. S. 275; *Waley v. Johnston*, 316 U. S. 101; *Williams v. Kaiser*, 323 U. S. 471; *Johnson v. Zerbst*, 304 U. S. 458; *Rice v. Olson*, 324 U. S. 786; *Powell v. Alabama*, 287 U. S. 69.

Wherefore Petitioner prays:

1. That a writ of certiorari issue out of and under the seal of this Court, directed to the Circuit Court of Appeals for the Sixth Circuit, commanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said circuit court of appeals had in the case numbered and entitled on its docket No. 10307, Marianna von Mohke, Appellant v. A. Blake Gillies, Appellee, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment of said circuit court of appeals herein may be reversed by this Court and petitioner remanded to the District Court of the United States for the Eastern District of Michigan, Southern Division, for such further proceedings as may there be determined.

2. That pending disposition of this petition and until the final action of this Court, petitioner may be enlarged on recognizance.

3. That petitioner may have such further relief as this Court may deem just and proper.

MARIANNA VON MOLTKE,

By G. LESLIE FIELD,

Attorney for Petitioner,
415 Dime Building,
Detroit 26, Michigan.

Dated April 22, 1947.

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Supreme Court of the United States

OCTOBER TERM, 1946

No.

MARIANNA VON MOLTKE,
Petitioner,

vs..

A. BLAKE GILLIES,
Superintendent of the Detroit House of Correction,
Respondent.

**BRIEF IN SUPPORT OF PETITION FOR
WRIT OF CERTIORARI**

OPINIONS BELOW

The District Court filed an opinion (R. 170-174) which has not been officially reported.

The opinion of the Circuit Court of Appeals was filed March 10, 1947 (R. 182-197) and has not yet been officially reported.

JURISDICTION

Date of order and judgment of the Circuit Court of Appeals for the Sixth Circuit to be reviewed is March 10, 1947 (R. 181).

Section 240 of the Judicial Code as amended, being section 347 (a), Title 28, U. S. C. A., is believed to sustain the jurisdiction of this Court herein.

STATEMENT OF CASE

(Unless otherwise indicated the following facts are undisputed)

Petitioner, a middle-aged housewife who spoke German at home (R. 70) and had only a limited knowledge of English (R. 69, 71) and no previous experience with legal proceedings of any kind (R. 48) was suddenly arrested by agents of the Federal Bureau of Investigation (hereafter for brevity called F. B. I.) on a presidential warrant as a dangerous enemy alien (R. 48, 49). She was questioned for four days and told that she was not entitled to be represented by counsel (R. 50). About 3 weeks after her arrest she was handed a lengthy indictment charging her with conspiracy to violate the espionage act (R. 20-34) which she read but testified she did not understand (R. 50). She testified that she did not know the meaning of the word "conspiracy" or what she called the "over" acts (R. 50, 69, 85, 87 and note overt acts numbered XXIV, XXIX, XXX, XXXI and XXXII, R. 29-31).

Three days after receiving the indictment, petitioner and another woman defendant were taken to a Federal courtroom where a criminal trial was in progress (R. 51, 52). The District Judge interrupted the trial and requested the attorney acting for the defendant in that case to represent petitioner and the other woman defendant (R. 11, 51, 111).

The attorney was reluctant to act but upon being assured by the Judge that it would be only for the arraignment and would take only a few minutes, consented (R. 51, 111). While both women were seated in the courtroom, the attorney held a hurried, whispered conversation with them. He did not see the indictment, discuss the charges or advise petitioner and the other woman other than to urge them to stand mute (R. 52, 112) which they did though petitioner did not understand the suggested procedure (R. 52). This was the only contact the attorney had with them and the whole proceeding took only a few minutes. Later the same day, the attorney entered a written appearance for both defendants "for arraignment only" (R. 47). Neither petitioner nor her husband had any means to retain or pay counsel (R. 51, 167, 168).

Immediately following the arraignment, the District Judge told petitioner that he would appoint another attorney right away to represent her at the trial (R. 53). No attorney was appointed, however, though petitioner waited for one to appear (R. 57).

Petitioner appealed to F. B. I. agents who visited and questioned her at the jail as to what she should do (R. 96, 121, 122). Two of the agents told her they could not advise her (R. 129, 147) and one of them testified (R. 151):

"Mrs. von Moltke was endeavoring to get advice or information from me, or opinions, and yet she realized I couldn't give her opinions, but she tried in the best way she could to get some idea."

Agent Collard, who had practiced law in Texas before joining the F. B. I. (R. 140), of which fact petitioner was advised (R. 56), was more accommodating. He spent several hours with petitioner in the matron's office at the jail "explaining" the indictment and attempting to define the

nature of a conspiracy (R. 141, 142). In doing so, he used an illustration from which the petitioner concluded that the mere act of conferring with people who later turned out to be guilty of criminal acts, would also make her guilty (R. 55, 144). After being thus advised, she said to F. B. I. agent Collard (R. 55):

"If that is the law in the United States, I don't know how I ever can prove myself innocent, and how will any judge know how am I guilty if this is the law?"

F. B. I. agent Collard then told her that the probation department would collect the proper data and present it to the judge, so that he would "know what to go by" (R. 55).

About this time F. B. I. agent Kirby told petitioner that he had been in Milan (location of a Federal prison near Detroit) and that the other defendants in the case were going to plead guilty (R. 84). Petitioner asked him whether she would be permitted to have a trial if all the other defendants pleaded guilty and he advised her that the answer to that question would be up to the United States Attorney's office (R. 85, 134).

During this time petitioner was told by F. B. I. agents who visited her at the jail that public sentiment was hostile; that the trial would be a public spectacle; that petitioner and the other defendants would have to face a hostile public if they went to trial, but that the F. B. I. agents would protect them (R. 53, 54, 83, 84). Petitioner testified that she asked F. B. I. agent Dunham (R. 82):

"* * * if we go to court will we be bodily attacked?"

and that he answered:

"it is war time—you have to bear that in mind. Public sentiment grows from war hysteria. You don't need to be afraid; you will be protected."

Petitioner decided that her case was hopeless and believed she had no alternative but to plead guilty (R. 58, 77, 78). She inquired as to the consequences of pleading guilty, particularly with respect to being deported as she had three American born sons and a husband who was a naturalized American citizen (R. 58, 59, 101). Her husband strongly advised her not to do anything until she had seen a lawyer (R. 60).

Just prior to October 7, 1943, petitioner was told by a fellow woman prisoner that unless petitioner pleaded guilty, her husband would be implicated (R. 54, 61). Greatly disturbed, petitioner asked to see F. B. I. agent Colliard and when he arrived told him what she had heard and asked him if it was true. He told her that he could not answer her question (R. 61). Petitioner decided there was some truth in what she had heard and said she was ready to plead guilty. She was immediately taken before another District Judge where, without counsel, she signed a partially illegible mimeographed paper (R. 36) which she testified she did not understand (R. 66, 67) but signed because she was told it was a matter of form (R. 109, 110), and pleaded guilty to the charge in the indictment (R. 35).

During the latter part of December, 1943, following her plea of guilty, petitioner testified that she learned for the first time through an attorney (a) that her plea of guilty was not an irrevocable act, but that it was permissible to withdraw the plea and have a trial and also (b) that in the United States a defendant does not have to prove himself innocent as is the case in European countries, but that it is

the duty of the prosecuting attorney to prove guilt (R. 73). Later this information was partially confirmed to petitioner by F. B. I. agent Dunham (R. 78, 79).

After considerable delay and effort an attorney was appointed by the District Judge for the purpose of making a motion for leave to withdraw petitioner's plea of guilty (R. 37-45). The motion was heard and denied November 15, 1944, without the taking of any testimony or permitting petitioner to take the stand (R. 46, 47) and petitioner was immediately sentenced to four years' imprisonment (R. 8). Thereafter writ of habeas corpus was dismissed after hearing in the District Court (R. 175) which decision was affirmed by the Circuit Court of Appeals, one Judge dissenting (R. 181-198).

SPECIFICATION OF ERRORS

1. The Circuit Court of Appeals under the undisputed evidence and proofs herein erred in holding that petitioner freely, competently and understandingly waived her constitutional right to the assistance of counsel in her defense and in affirming the decision of the District Court on that issue.

2. The Circuit Court of Appeals erred in holding under the undisputed evidence and proofs herein that petitioner was not coerced, intimidated and deceived by agents of the F. B. I. into pleading guilty and waiving her right to the assistance of counsel and thus deprived of her liberty without due process of law contrary to the mandate of the Vth Amendment, and in affirming the decision of the District Court on that question.

SUMMARY OF ARGUMENT

Petitioner did not competently and validly waive her constitutional right to assistance of counsel for the following reasons:

(a) In the light of petitioner's background and experience and the complexity of the charges brought against her, petitioner, without the assistance of counsel, was incapable of understanding and properly evaluating the proceeding in which she was involved and intelligently and competently waiving her constitutional right to assistance of counsel;

(b) Petitioner was given conflicting and confusing advice as to her right to be represented by counsel;

(c) Petitioner was misled and confused as to her rights by

(1) Wholly inadequate "assistance" of counsel at her arraignment;

(2) The non-appearance after arraignment of counsel the court promised to appoint but did not appoint to represent her at the trial of the case; and

(3) Erroneous and misleading advice given petitioner by F. B. I. agent Collard as to her legal rights.

(d) Petitioner was coerced, deceived and intimidated by F. B. I. agents into waiving her right to counsel and pleading guilty in that

(1) She was falsely advised by one of the agents that all other defendants in the case would shortly plead guilty;

(2) She was informed by an F. B. I. agent that if she was the only one not pleading guilty, the United

States District Attorney would have to decide whether or not she could have a trial;

- (3) She was permitted to understand that unless she pleaded guilty, her husband might be implicated in the case.

(e) Petitioner did not understand and was not advised concerning the nature or consequences of the "waiver" she signed as

- (1) The waiver itself is illegible in important parts including the title;
- (2) Petitioner understood that the waiver meant that she would have to appear for trial and only signed it after being assured by the Assistant United States Attorney that it was just a matter of form.

ARGUMENT

PETITIONER DID NOT COMPETENTLY AND VALIDLY WAIVE HER CONSTITUTIONAL RIGHT TO ASSISTANCE OF COUNSEL FOR THE FOLLOWING REASONS:

- (a) In the light of petitioner's background and experience and the complexity of the charge brought against her, petitioner without the assistance of counsel was incapable of understanding and properly evaluating the proceeding in which she was involved and intelligently and competently waiving her constitutional right to assistance to counsel.

Amendment VI to the Constitution provides in part:

"In all criminal prosecutions, the accused shall enjoy the right to * * * have the Assistance of Counsel for his defense."

The importance of counsel to an accused in a criminal prosecution was forcefully stated in *Powell v. Alabama*, 287 U. S. at page 69, as follows:

"Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with a crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without proper charge, and convicted upon incompetent evidence; or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. *He requires the guiding hand of counsel at every step in the proceedings against him.* Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect." (Italics added.)

Equally vital to an accused is assistance of counsel in connection with a plea of guilty, as was pointed out by Mr. Justice Douglas in *Williams v. Kaiser*, 323 U. S. at page 475, referring to the above-quoted language:

"Those observations are as pertinent in connection with the accused's plea as they are in the conduct of a trial. The decision to plead guilty is a decision to allow a judgment of conviction to be entered without a hearing—a decision which is irrevocable and forecloses any possibility of establishing innocence * * *. Only counsel could discern from the facts whether a plea of not guilty to the offense charged or a plea of guilty to a lesser offense would be appropriate: A layman is usually no match for the skilled prosecutor whom he confronts in the court room. He needs the aid of counsel lest he be the victim of overzealous prosecutors, of the law's complexity, or of his own ignorance or bewilderment."

See also *Johnson v. Zerbst*, 304 U. S. at pages 462, 463 for similar observations.

It is conceded here, as it was in the District Court and in the Circuit Court of Appeals, that an accused may waive his constitutional right to have the assistance of counsel. *Adams v. U. S.*, 317 U. S. 269. To be valid, however, such waiver must be made freely, understandingly and with full knowledge of one's right to assistance of counsel. *Adams v. U. S.*, *supra*; *Johnson v. Zerbst*, 304 U. S. 458; *Walker v. Johnston*, 312 U. S. 275.

Tests to determine the validity of such waivers have been laid down by this Court. In *Adams v. U. S.*, *supra*, it is said:

"The question in each case is whether the accused was competent to exercise an intelligent, informed judgment and for determination of this question it

is of course relevant whether he had the assistance of counsel."

The question posed is ordinarily a question of fact and, as was said in *Johnson v. Zerbst*, *supra*:

"The determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, *including the background, experience, and conduct of the accused.*" (Italics added.)

Certainly the determination of whether there has been a valid waiver does not depend upon the observance of certain conventional formalities of procedure nor blindly and mechanically following "delusively simple rules of trial procedure." *Adams v. U. S.*, 317 U. S. at pp. 276, 277; *Ex parte D'Elia*, 51 F. Supp. 542.

Petitioner's Background and Experience

Petitioner came to the United States with her husband from Germany in 1927 (R. 70). They moved to Detroit, Michigan in 1930 (R. 48). Her husband became a naturalized citizen and was an instructor in German at Wayne University at the time of petitioner's arrest (R. 48). She is the mother of three American-born sons (R. 59) the youngest of whom is ill with diabetes and requires two injections of insulin daily and a strictly supervised diet (R. 48). Prior to her arrest petitioner kept house for her husband and two sons and looked after the younger one who is diabetic constantly (R. 48, 58).

Petitioner knew no English when she arrived in this country. Her opportunities to learn English were limited because of her household duties and she spoke only German at home (R. 70). She testified that her knowledge of

English at the time of her arrest was imperfect and that she learned most of it through reading and listening to the radio (R. 69-71). She testified that she thinks in German and translates into English (R. 71). At the time of the habeas corpus hearing in the District Court, petitioner had been in custody about 31 months during which time she had improved her English and had learned a great deal about the language (R. 71). Prior to her arrest she had never been involved in court proceedings (R. 48) and she was not familiar with legal terminology (R. 85). Her only activities outside her home were voluntary work done for the American Red Cross, social work at Y. W. C. A., helping with gas rationing, membership in the Parent-Teacher Association and assisting with mentally deranged people at a nearby state hospital (R. 88, 89). Because of her sick child, however, she was not able to devote much time to the activities mentioned (R. 89). She belonged to no political organizations or clubs (R. 90).

Neither petitioner nor her husband had any funds or property with which to retain and pay an attorney (R. 51, 167, 168). Shortly following petitioner's arrest, her husband lost his position as instructor at Wayne University and obtained a job at \$35.00 a week (R. 168).

Nature of Charge

The indictment in which petitioner is named as a defendant is a lengthy one (R. 20-34) involving eight defendants and sixteen named co-conspirators. Forty-seven overt acts are set forth of which only five (R. 29-31: XXIV, XXIX, XXX, XXXI, XXXII) name petitioner. Four of them charge that petitioner met and conferred with one or more of the other defendants on designated dates and the other charged that on a specific date petitioner introduced one of the defendants to another, all "in pursuance of said con-

spiracy and to effect the object thereof." The indictment charges conspiracy to violate Section 32, Title 50, U. S. C. A. (unlawfully disclosing information affecting National defense).

Early during the hearing on the writ of habeas corpus, the District Judge concluded that petitioner was a very intelligent woman (R. 49) and the majority opinion of the Circuit Court of Appeals states that the record shows her to be extremely intelligent with a remarkable command of the English language for a foreign-born person (R. 183).

Petitioner's background and experience do not seem to support these conclusions. While many examples of petitioner's language difficulties were eliminated by reducing portions of the transcript to narrative form, a mere scanning of the record demonstrates, it is believed, that petitioner had considerable difficulty making herself understood (e. g., R. 50, 54, 65, 66, 67, 69, 70, 71, 76, 80, 81, 82). While the degree of her intelligence cannot be determined with any great accuracy from the record, it is clear that her experience did not encompass legal proceedings. Nor is the finding of intelligence consistent with the incontrovertible fact that petitioner is presently in custody on a plea of guilty to a charge which she was incapable of understanding and which was never explained to her by counsel assigned to assist her. Unless it is assumed that there exists an all-encompassing intelligence transcending human experience, it is difficult if not impossible to reach the conclusion upon this record that petitioner was intelligent with respect to the events beginning with her arrest. On the contrary, petitioner exhibited an almost total inability to comprehend and properly react to forces and events which finally culminated, almost inexorably so far as she was concerned, in self-conviction and imprisonment. It is sub-

mitted that petitioner's background and experience did not qualify her alone to cope with the overwhelming problems that confronted her following her arrest when she was suddenly transported from the quiet routine of her family duties into a strange and terrifying world in which a new and unfamiliar language was spoken and she was subjected to such experiences as prolonged interrogations by trained criminal investigators, a night hearing before an Enemy Alien Hearing Board, a 17-page indictment couched in legal language, an arraignment during which she and another woman defendant held a short whispered conversation with an attorney they had never seen before and on his advice "stood mute," the long wait for the attorney the court had promised to appoint for her—the attorney that never came—the disheartening "legal" advice and information given her by an agent of the F. B. I. which overpowered her will to resist and convinced her that her case was hopeless and that there was no alternative but to plead guilty, and the final nightmare of signing a partially illegible mimeographed form (which she thought was a paper requiring her to appear for trial whenever she was wanted) and pleading guilty, followed, as an anticlimax, by prolonged but unsuccessful efforts to withdraw the plea and have a trial.

A good example of petitioner's confusion and inability to understand the nature of the charges brought against her was her repeated denial that she had even been in Grosse Pointe (a suburb of Detroit) as stated in overt act XXXI (R. 31), and that therefore she was not guilty (R. 63, 65, 68). Apparently this puzzled the District Judge as he questioned her on the point as follows (R. 68, 69):

"Q. (By Mr. Kronner): Did you know, Mrs. von Moltke, what the charges against you were, from a reading of the indictment?"

A. You mean what the accusation was?

Q. Yes:

A. I knew I had never been in Grosse Pointe.

Mr. Fordell: That is not responsive to the question.

The Court: When you refer to that fact—you knew you were not in Grosse Pointe—why did you say that, why did you give that answer?

The Witness: Because what I read in the accusations, I felt I was not guilty of it, and I talked this over with Mr. Collard,¹ because Mr. Collard took my statement, and he knew that I had told the truth and that I was not guilty of the 'over' acts."

Further confusion on the part of petitioner as to the charges is illustrated by the following (R. 77, 78):

"Q. (By Mr. Kronner): Now, then, Mrs. von Moltke, how did Mr. Collard¹ explain to you as to the nature of these charges? Did he attempt to explain just what these charges did mean?

A. No, Mr. Collard said that those charges don't mean a thing, and then he explained to make me see the Rum Runners' case.² I told him, 'Mr. Collard, you know I never introduced Mr. Abt to Mrs. Dennen (Dineen).'"

Then he explained the Rum Runners' case and it gave me the idea that if such is the law in the United States, you can't do anything about it."

This Court has recognized the difficulties confronting a defendant charged with conspiracy. In *Glasser v. U. S.*, 315 U. S. at page 76, it is stated:

"In conspiracy cases, where the liberal rules of evidence and the wide latitude accorded the prosecution may, and sometimes do, operate unfairly

¹ of the F. B. I.

² See R. 55.

³ See overt act XXX, R. 30.

against an individual defendant, it is especially important that he be given the benefit of the undivided assistance of counsel without the court's becoming a party to encumbering that assistance."

The foregoing language was used with reference to Glaser, a United States District Attorney with four years experience in criminal cases. Manifestly these observations would apply with added force to petitioner who was wholly inexperienced in legal matters. Even intellectual brilliance would not qualify a layman to cope with the intricacies of a criminal indictment grounded on conspiracy. *Adams v. U. S.*, 317 U. S. 269.

Admittedly a conspiracy is not easy to define.

"It has been said that there is perhaps no crime an exact definition of which is more difficult to give than the offense of conspiracy; a difficulty resulting in a large measure from the fact that the law on the subject of conspiracy, except where settled by legislative enactment, is beyond certain limits, in a very uncertain state; the cases beyond such limits which have been adjudged to be conspiracy, appear, it has been said, 'to stand apart by themselves' and to be 'devoid of that analogy to each other which would render them susceptible to classification.'" 12 C. J. 640. See also 11 *Am. Jur.* 543.

The advice given petitioner by F. B. I. agent Collard as to what constituted a conspiracy was clearly erroneous as passive cognizance of a contemplated crime or unlawful act or mere negative acquiescence is not sufficient to make one guilty of conspiracy. 11 *Am. Jur.* 544.

The truth is that lawyers and even judges sometimes have great difficulty in determining what constitutes a conspiracy. *Gebardi v. U. S.*, 287 U. S. 112; *U. S. v. Falcone*, 311 U. S. 205; *Hartzel v. U. S.*, 322 U. S. 680.

The contention that petitioner, being an intelligent woman, easily could have decided for herself whether or not she was guilty of the charges contained in the voluminous indictment is, it is believed, both unwarranted and naive. The assumption upon which the contention rests is that guilt or innocence can be determined by the simple process of "searching one's conscience," thus ascribing to that abstraction labeled conscience (which some psychologists claim is a mere residuum of childhood inhibitions and feelings of guilt) power to deal with problems arising outside one's experience. If this were true, the constitutional guarantee of assistance of counsel would be unnecessary and the observations of this Court upon the inability of laymen to cope with the intricacies of criminal procedure, superfluous. The cold truth of the matter is that determination of guilt and innocence is one of the knottiest and most difficult processes in the administration of justice.

A case in point is *U. S. v. Heine*, 151 F. (2d) 813, C. C. A. 2, in which it was held that the act of a German-born American citizen in collecting, assembling and transmitting to Germany information concerning U. S. aircraft production from sources accessible to anyone in the U. S. did not constitute a violation of the espionage act (Section 32, Title 50, U. S. C. A.). See also *Hartzel v. U. S.*, 322 U. S. 680.

In the light, therefore, of petitioner's background and experience and the complicated nature of the charges brought against her, it is idle to say that she was competent to comprehend the nature of the charges and to make an intelligent determination of her guilt or innocence without the assistance of counsel. *Glasser v. U. S.*, *supra*; *Johnson v. Zerbst*, *supra*.

(b) Petitioner was given conflicting and confusing advice as to her right to be represented by counsel.

When petitioner was first taken into custody, she was told by one of the F. B. I. agents that as an enemy alien she was not entitled to be represented by an attorney (R. 50) and at the immigration detention home she was told by an immigration officer that she was not allowed to have counsel before the Enemy Alien Hearing Board but that friends or relatives were permitted to attend the hearing (R. 50). Petitioner was not aware of the fact that the conspiracy case was a different case from the enemy alien proceeding (R. 170) and no one explained to her at the time she was handed the indictment that thenceforth she was entitled to counsel (R. 51). It is true F. B. I. agent Collard testified that on October 2, 1943 (five days before petitioner pleaded guilty) he explained to petitioner that technically she had been rearrested on the indictment (R. 141) but he did not testify and there is no claim that he or anyone else explained or pointed out to her that she was entitled to have the assistance of counsel after she had been indicted. Manifestly informing petitioner that she had been "technically rearrested on the indictment" without further explanation could not have enlightened her as to her right to assistance of counsel. Rather, such a statement would only serve to add more confusion to an already baffling situation. The record shows that petitioner was informed by the court at the time of her arraignment that she was entitled to counsel (R. 51) but this was followed by a wholly inadequate and disillusioning example of legal representation at the arraignment and the subsequent nonappearance of counsel promised her by the court.

Assistant U. S. Attorney Babcock admitted that he did not point out to petitioner that there was a difference between the proceedings initiated by her arrest on presiden-

tial warrant and those following the indictment (R. 164, 165), though he questioned her at the hearing before the Enemy Alien Hearing Board, conferred with her before she pleaded guilty (R. 58, 158) and appeared with her before the court when the plea was made. (R. 65, 66, 67).

It is not anticipated that the Government will contend that petitioner was afforded the assistance of counsel contemplated by the VI Amendment, but will rely upon a claim of waiver. It is submitted, however, that the Government's failure to provide petitioner with effective assistance of counsel at her arraignment, the failure thereafter to appoint counsel to represent her at the trial as promised and the erroneous and misleading information given her by F. B. I. agents Collard and Kirby must be given great weight in considering petitioner's subsequent "waiver" of counsel. Had petitioner been given effective continuous and proper representation beginning with her arraignment, it is reasonable to assume that the series of misadventures culminating in her plea of guilty would have been checked and prevented. As was said in *Glasser v. U. S.*, *supra*:

"The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

(c) Petitioner was misled and confused as to her rights by

- (1) Wholly inadequate "assistance" of counsel at her arraignment;
- (2) The nonappearance after arraignment of counsel the court promised to appoint but did not appoint to represent her at the trial of the case;
- (3) Erroneous and misleading advice given petitioner as to her legal rights by F. B. I. Agent Collard.

(1) and (2):

It is clear under the rulings of this Court that petitioner was entitled to the undivided, continuous and effective assistance of counsel at every step of the proceedings unless she waived it. *Glasser v. U. S.*, *supra*; *Hawk v. Olson*, 326 U. S. 271; *Powell v. Alabama*, 287 U. S. 69.

Admittedly the attorney who reluctantly appeared both for petitioner and another woman defendant *for the arraignment only* did not give petitioner undivided, continuous or effective assistance. He did not see the indictment or discuss the charges. His only advice to petitioner was to stand mute. Such offhand and insubstantial services made a mockery of the assistance of counsel guaranteed by the VI Amendment. The nonappearance thereafter of counsel promised by the court gave petitioner added reason to believe that her case was so hopeless that no attorney would represent her (R. 57) and that it would be futile for her to try to prove her innocence (R. 75, 76).

(3) Erroneous and misleading advice given petitioner by F. B. I. agent Collard as to her legal rights.

After petitioner's arraignment, she was taken to the county jail (R. 53). Petitioner waited for the attorney the court had promised to appoint for her to appear (R. 57) but no attorney came and she appealed to various F. B. I. agents who visited her at the jail as to what she should do (R. 63, 96, 122, 134). Agent Collard, who had practiced law before joining the F. B. I., testified that he talked with petitioner at the jail on October 2 and 4, 1943, a few days before she pleaded guilty (R. 137, 138). He admitted conferring with her several hours in the jail matron's office during which he "explained" the indictment to her (R. 140) and attempted to explain the nature of a conspiracy (R. 142). He heard petitioner's testimony as to this conference and admitted that her version was probably correct (R. 142). Petitioner's testimony on the conference was as follows (R. 55):

"Q. Now then, will you tell the conversation you had with Mr. Collard?

A. I brought my indictment to the office, and assured Mr. Collard it was—I told Mr. Collard that he has taken my statement and he knew that I never was—I didn't do those things which are called 'Over' acts, and Mr. Collard explained to me that the indictment doesn't cover the charge, and I seemed not to be able to understand, so Mr. Collard explained the indictment to me by an example which he called the 'Rum Runners.'

Q. Tell how he advised you and what he said.

A. This is what I understood: That if there is a group of people in a 'Rum' plan who violate the law, and another person is there and the person doesn't know the people who are planning the violation and doesn't know what is going on, but still it seemed after two years this plan is carried out,

in the law the man who was present becomes * * * the person nevertheless is guilty of conspiracy. And I said to Mr. Collard: 'If that is the law in the United States, I don't know how I ever can prove myself innocent, and how will any judge know how am I guilty if this is the law?' Mr. Collard then told me about the Probation Department, of which I had not heard before, and he explained to me that it is the duty of this office—the Probation Department—to collect the proper data and to present it to the judge, so that the judge will know what to go by."

Collard testified as follows on cross examination (R. 144):

"Q. And did you explain to Mrs. von Moltke the nature of an Overt Act?

A. Well, if she asked me, I probably tried to, but whether she asked me or not I just don't remember.

Q. And did Mrs. von Moltke ask you whether merely conferring with people who later turned out to be guilty of criminal acts would also make her a criminal, and guilty of criminal acts?

A. I do not just recall that particular question. It is quite possible."

The foregoing shows beyond question that petitioner was misled and deceived by Collard as to her legal rights and her testimony clearly demonstrates that the erroneous advice and explanations given by Collard greatly influenced her subsequent thoughts and actions and counted heavily in her determination to plead guilty (R. 55, 75).

With counsel to assist and guide her, the situation probably would have been different. As was forcefully stated by Mr. Justice Black in *Johnson v. Zerbst*, 304 U. S. at pages 462, 463:

"It (the VIth Amendment) embodies a realistic recognition of the obvious truth that the average de-

fendant does not have the professional skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel. That which is simple, orderly, and necessary to the lawyer—to the untrained layman—may appear intricate, complex and mysterious.”

(d) Petitioner was coerced, deceived and intimidated by F. B. I. agents into waiving her right to counsel and pleading guilty in that

- (1) she was falsely advised by one of the agents that all other defendants in the case would shortly plead guilty;**
- (2) she was informed by an F. B. I. agent that if she was the only one not pleading guilty, the United States District Attorney would have to decide whether or not she could have a trial.**

In presenting the points of fact and argument under this heading, counsel for petitioner recognizes that the Federal Bureau of Investigation is an essential law enforcement agency, that its methods of operation and policies have received wide public approval, and that its personnel is made up largely of sincere, able and well-trained men. However, it by no means follows that the Federal Bureau of Investigation cannot make mistakes in individual cases and no unwarranted generalization to the contrary should be permitted to close the door to inquiry into particular instances of wrongdoing.

F. B. I. agent Kirby visited and talked with petitioner at the county jail on a number of occasions after her arraignment and before she pleaded guilty (R. 134). On one of these visits he told petitioner that he had been in Milan (location of a Federal prison near Detroit) and that the other defendants in the case would plead guilty the following week (R. 85). F. B. I. agent Kirby did not deny this

but testified that he did not recall making this statement (R. 134). However, he partially confirmed petitioner's testimony on this point as follows (R. 134):

“Q. And did she (petitioner) ask you that if all the other defendants pleaded guilty whether she would have a right to a trial?

A. I believe she did ask me that question on one occasion.

Q. And did you answer that question?

A. To the best of my recollection, my answer was that the question of trial would be up to the United States Attorney's Office.”

The fact is that all other defendants did not plead guilty. *Thomas v. U. S.*, 151 F. (2d) 183. However, the effect of these suggestions upon petitioner could not have been other than injurious. Petitioner had no reason to doubt the statements made to her by Federal law enforcement officers and no means of verifying them through consultation with counsel. They served, therefore, to increase her sense of helplessness and despair to a point where resistance ceased and blind acceptance of what appeared to be inevitable followed.

- (3) She was permitted to understand that unless she pleaded guilty, her husband might be implicated in the case.

Prior to her arrest, petitioner took care of her diabetic son constantly (R. 48). After the arrest her husband looked after the boy (R. 49) who finally some three months later, with the assistance of F. B. I. agent Dunham, was placed in a home (R. 57). In the interim he was taken care of in the home of friends of petitioner and her husband, but because it was a complicated case they did not wish to continue to care for him (R. 57, 149, 150). A few days after petitioner's arrest, her husband lost his position at

Wayne University (R. 150) and obtained a job at \$35.00 a week, which represented a sharp decrease in his income (R. 168). Petitioner was greatly concerned about the boy and when she heard that unless she pleaded guilty her husband might be implicated she became alarmed and asked permission to speak to F. B. I. agent Collard (R. 54). When he arrived, she told him what she had heard and asked him whether there was any truth in the statement that her husband might be implicated in the case unless she pleaded guilty (R. 61). He told her that he could not answer her question. Petitioner interpreted this as meaning that there was some truth in the statement (R. 62). Greatly troubled, confused and desperate (R. 64) and fearful that there would be no one to look after her diabetic son, petitioner decided to plead guilty (R. 63). She announced her decision to F. B. I. agents Hanaway and Collard and was immediately taken before a Federal Judge and pleaded guilty (R. 66, 67).

Any attorney would undoubtedly have been able to quiet petitioner's fears by pointing out to her that her husband's implication or nonimplication in the case would not depend upon whether she pleaded guilty or not. But "That which is simple, orderly, and necessary to the lawyer—to the untrained layman—may appear intricate, complex and mysterious." Unadvised and under circumstances of extreme emotional stress, petitioner was unable to reach any other conclusion than that there was nothing she could do except plead guilty. Obviously at this point, petitioner stood in great need of the assistance of counsel contemplated by the VIth Amendment.

The representations made to petitioner by F. B. I. agents that all other defendants in the case would shortly

¹ *Johnson v. Zerbst, supra.*

plead guilty; that if she was the only one not pleading guilty she might or might not be allowed to have a trial depending, not on her constitutional right, but on the will of the United States District Attorney; and the conduct of F. B. I. agent Collard in permitting petitioner erroneously to conclude that unless she pleaded guilty her husband might be involved in the case, constituted coercion, deception and intimidation vitiating her conviction and sentence. The Vth Amendment provides that no person shall be "deprived of life, liberty or property, without due process of law. * * *." It has been decided by this Court that a conviction on a plea of guilty coerced by Federal law enforcement officers is no more consistent with due process than a conviction supported by a coerced confession. *Waley v. Johnston*, 316 U. S. 101; see also *Walker v. Johnson*, 312 U. S. 275; and see dissenting opinion of Circuit Judge McAllister (R. 189-198).

(e) Petitioner did not understand and was not advised concerning the nature or consequences of the "waiver" she signed as

- (1) The waiver itself is illegible in important parts including the title;
- (2) Petitioner understood that the waiver meant that she would have to appear for trial and only signed it after being assured by the Assistant United States Attorney that it was just a matter of form.

The waiver signed by petitioner is not conclusive here and the validity thereof is a proper subject of inquiry as a question of fact. *U. S. v. Adams*, 320 U. S. 220; *Adams v. U. S.*, 317 U. S. 269.

There is a presumption against waiver (*Johnston v. Zerbst*, *supra*; *Glasser v. U. S.*, *supra*) and a plea of guilty does not *ipso facto* constitute a waiver of right to assistance of counsel, *Rice v. Olson*, 324 U. S. 786.

The following language from *Johnson v. Zerbst*, *supra*, is illuminating:

"It has been pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.' * * * The determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused."

In the *Glasser* case this Court said:

"To preserve the protection of the Bill of Rights for hard-pressed defendants, we indulge every reasonable presumption against the waiver of fundamental rights."

At the time petitioner pleaded guilty, she was handed a poorly mimeographed form to sign (R. 67, 108, 109, 110). Parts of the form (R. 36) are very difficult to read, particularly the title which, *if it had been properly mimeographed or typewritten*, would have read: "WAIVER OF ASSIGNMENT OF COUNSEL." The body of the instrument reads in part:

"I. . . . do hereby . . . waive . . . my right to be represented by counsel at the trial of this cause." (Italics added.)

Petitioner's testimony as to signing the waiver was positive. She stated that she tried to read the form and testified (R. 67):

"Q. To the best of your recollection, do you know what was on that paper?

A. It was something about—to my recollection—that I was to appear for trial whenever I was wanted, and I called Mr. Babcock's¹ attention to that and said I wouldn't sign this note because I did not want a trial. Mr. Babcock said this is all right, I could sign it; and I signed the slip.

Q. Was that, to the best of your recollection, the entire conversation between you and anybody in the courtroom that day about this paper you signed?

A. Yes, sir."

On cross examination she testified (R. 108, 109):

"Q. And then the Judge asked you whether you wanted an attorney?

A. I do not remember that he asked me that question.

Q. Did he ask you to sign something?

A. No. A note was given to me and I don't know who gave it to me.

¹ Assistant United States Attorney.

Q. Did you sign it?

A. Yes, after I asked Mr. Babcock about it.

Q. Did you read it?

A. I read it.

Q. What do you remember reading?

A. I asked Mr. Babcock what the trial affair means, and Mr. Babcock said that it is more or less a—I understood that a matter of form, and he said that it was all right, you can sign this and I signed it."

As a matter of fact the instrument itself (R. 36) lends support to petitioner's understanding that it referred to the trial of her case. Certainly the wording is clear: What is waived is counsel *at the trial*. There is no showing that petitioner waived her right to counsel in connection with her plea of guilty at which time the assistance of counsel is vital. *Williams v. Kaiser, supra*.

This contention is abundantly supported by the record. Petitioner testified on cross examination (R. 103):

"Q. And you husband told you not to plead guilty?

A. He did.

Q. He told you to get a lawyer?

A. Yes; he said I should not before I have seen an attorney; on such a question I should talk to an attorney first about the whole thing.

Q. Then you knew at that time that you were entitled to a lawyer before you pled guilty, if you wanted one?

A. I did not. *I just was wondering about the lawyer who never came.*" (Italics added.)

Even at the time petitioner pleaded guilty, a question was raised by the court as to the advisability of accepting her plea without an attorney being present (R. 66):

“Q. Now, then, tell what happened when the Jehovah Witness case was interrupted, and what occurred from there—from that time on?

A. I went in front of Judge Lederle,¹ and Mr. Babcock² handed the judge what I would call a folder, and Judge Lederle looked into that, and said he could not accept the change of plead (sic) because there was something about an attorney—either I did not understand what he said—but I understood that he said there was to be appointed an attorney in this case, or there was appointed an attorney in case,³ or there was to be present an attorney—but I knew distinctly the judge said he could not accept the change of plead, and Mr. Babcock⁴ explained to him that this was different, and that he could accept the change of plead, and I was handed a note, and it was said to my knowledge and recollection, it was said I was supposed to appear for trial in court and that was what I didn't want at all, so I called Mr. Babcock's attention to that.”

Petitioner's testimony as to this incident was confirmed by F. B. I. agent Hanaway (R. 130, 131).

Petitioner's testimony that she did not know about the presumption of innocence or that the Government had the burden of proving guilt is undisputed. About two and one-half months after her plea of guilty she learned for the first time through an attorney that in the United States a person accused of crime does not have to prove his innocence as is the case in some European countries, but that it is the task of the Government to prove guilt (R. 73), information subsequently confirmed by F. B. I. agent Dunham (R. 78). Petitioner was asked whether she would have pleaded

¹ U. S. District Judge.

² Assistant United States Attorney.

³ See special appearance of counsel for arraignment only: R. 47.

⁴ Assistant United States Attorney.

guilty had she known these facts beforehand (R. 73). An objection to this question by the Assistant United States Attorney was sustained. The stated ground of objection was that "the mere fact that she found out later that it *might have been tough* for the Government to prove the case does not establish that she didn't enter her plea intelligently" (R. 74; italics added). It is submitted, however, that a plea of guilty made by one who does not understand the nature of the charges against him or the elements of the offense for which he is indicted or is made under a misapprehension as to some material fact or without knowing or being advised of his constitutional right to counsel is not a free and voluntary admission of guilt or a valid waiver of such right. *Parker v. Johnson*, 29 F. Supp. 829. See also *McDonald v. Johnson*, 62 F. Supp. 830.

Reference is made in the majority opinion of the Circuit Court of Appeals to the fact that two attorneys visited petitioner on one occasion while she was confined in the county jail (R. 183, 194). They went at the request of petitioner's husband (R. 56, 114). One of them (Okrent) was a former student of petitioner's husband at Wayne University (R. 93, 114) and the other (Berger) was a member of a law firm with which Okrent was associated (R. 114). They were told by petitioner's husband that neither he nor petitioner had any funds or property with which to retain or pay counsel (R. 13). The visit was made primarily to ascertain the facts and report thereon to petitioner's husband (R. 116). Mr. Berger told petitioner that he and Okrent were not appearing as her attorneys and *that if she should say anything to them he thought the Government should know about, he would feel free to disclose it* (R. 116). Berger told her he was not there to advise her (R. 120) and

neither attorney did advise her regarding her rights or discuss possible defenses to the charges against her (R. 13, 14, 117). They found petitioner in a highly nervous condition and greatly perturbed about her sick child and her husband (R. 115, 117). Petitioner protested her innocence and inquired whether her husband would get his position back at Wayne University if she pleaded guilty (R. 120). The fact that Berger and Okrent were Jews was considered and discussed as a complicating factor (R. 116). Neither attorney offered to represent her (R. 93, 94). They decided not to take the case and reported their decision to petitioner's husband (R. 14, 119). At this time petitioner was waiting for the attorney the court had promised to appoint for her. She testified (R. 57):

"Q. Up to that time had any other attorney advised you?

A. No, sir.

Q. Were you waiting for an attorney?

A. I was waiting for an attorney.

Q. What attorney?

A. Please?

Q. What attorney were you waiting for?

A. The attorney which Judge Moinet was going to appoint for me."

It could scarcely be contended that the single visit of these attorneys who warned her that anything she said might be used against her constituted effective assistance of counsel or is evidence upon which to support a conclusion that petitioner was sufficiently advised of her rights. On the contrary, the fact that the attorneys expressed grave doubts as to whether they would take the case and subsequently decided not to represent her adds substance to petitioner's contention that she was confused, unadvised and misinformed as to her right to assistance of counsel. See *Robinson v. Johnston*, 50 F. Supp. 774.

Some point is made in the majority opinion of Circuit Court of Appeals that petitioner stated on several occasions she did not wish to consult an attorney but wanted to settle the matter herself (R. 185, 186). Petitioner's testimony is to the contrary (R. 85, 96, 103) and even assuming for the purpose of argument that petitioner refused the assistance of counsel, this by no means disposes of the question. *Adams v. U. S.*, *supra*. The test is not whether a particular accused refused the aid of counsel but rather whether he did so freely, competently and knowingly, which necessarily raises involved questions of law and fact. The application of simple tests to intricate problems is likely to yield unjust and inadequate solutions. To conclude that because petitioner refused the aid of counsel she waived her rights in that respect ignores voluminous and persuasive evidence and proofs in conflict with the conclusion reached.

In the majority opinion of the Circuit Court of Appeals the statement is made that petitioner "sent the chief assistant district attorney, through an F. B. I. agent, a proposition to plead guilty * * * if the district attorney's office would agree to" three conditions (R. 186). After petitioner had undergone the experiences set forth above including conflicting advice as to her right to be represented by counsel, perfunctory and offhand representation at her arraignment, the nonappearance of counsel promised by the court, the refusal of two attorneys who interviewed her at the request of her husband to take the case, the gross misinformation given her by F. B. I. agents, and petitioner had concluded that there was nothing else to do but plead guilty, she sought information through an F. B. I. agent (apparently her only contact) as to whether pleading guilty would result in her being deported and if not whether she could be sent to a nearby prison so that she could keep

contact with her family; and whether the publicity would stop (R. 58). Assistant United States Attorney Babcock advised petitioner that if she pleaded guilty it would have to be without conditions (R. 159) and explained that he could not control the press, that her question as to deportation was a matter for the Immigration and Naturalization Service to decide, and that he had no control over the designation of a prison but would, if she requested, write a letter of recommendation that her place of incarceration be near Detroit where her family might see her (R. 159). There is no claim that petitioner tried to obtain any assurance concerning the nature of the sentence that might be imposed. The implication that she callously tried to make a "deal" finds no support in the record. The forces which finally impelled petitioner to plead guilty were already so overwhelming that notwithstanding her failure to obtain any assurances whatsoever as to the three matters mentioned, she nevertheless pleaded guilty. The point not to be overlooked, however, is that petitioner was not advised on the questions she raised by counsel assigned to assist her but by an Assistant United States Attorney who was in charge of the case for the Government. Similarly, her questions regarding the nature of the charges against her and her legal rights were answered, albeit erroneously, by F. B. I. agent Collard who had originally arrested and interrogated her.

A point is made in the majority opinion of the Circuit Court of Appeals (R. 186) that petitioner was advised by one judge that she was entitled to have an attorney appointed for her by the court and that a second judge asked her specifically whether she wished to be represented by counsel. While it is true that the judge who presided at her arraignment told her that he would appoint counsel to represent her at the trial, he failed to do so and petitioner waited in vain for one to appear. As to being interrogated

by the second judge, it may be conceded that routine questions were put to petitioner concerning her right to counsel, etc., but it must be remembered that this occurred after petitioner had been conditioned into a state of abject acquiescence by unlawful acts she charges violated her constitutional rights.

It is stated in said majority opinion that petitioner's counsel emphasized the harshness of the ten-day rule then limiting the time for making a motion to withdraw a plea of guilty (R. 188: 18 U. S. C. following Section 688). The point was not raised or argued in the District Court or briefed in the Circuit Court of Appeals for the reason that it was not considered material to the issues presented in the habeas corpus proceeding. The question, as pointed out in the dissenting opinion (R. 197), was not whether petitioner should have been allowed to withdraw her plea but whether under the evidence and proofs her conviction and sentence were void because she had been deprived of her constitutional rights. See, however, *Canizio v. People*, 327 U. S. 82.

It is stated in said majority opinion (R. 184) that petitioner's own testimony contradicts her statement that she did not understand the charge. On cross-examination petitioner admitted that she had read the indictment and that she felt she was innocent of the charges (R. 90, 91). From this it is argued that petitioner must have known what the charges were, but it is submitted that the conclusion contended for is a *nonsequitur*. The key word in the question was the word "innocence" and what petitioner obviously was attempting to do was to protest her innocence. She was easily tricked into overlooking that part of the question which implied knowledge of the nature of the charges and eagerly answering that part that gave her an opportunity to assert her innocence and deny guilt. Her subse-

quent answers quoted on page 185 of the record show clearly that petitioner was thinking only of the overt acts. A somewhat similar incident occurred on petitioner's direct examination (R. 75, 76) as follows:

"Q. (By Mr. Kronner): Will you tell the conversation between Mr. Collard¹ and you on the occasion when he went over and read the indictment to you: tell everything you heard that was said.

A. I read the indictment and I took it to the office. I told Mr. Collard, I said, 'Say, Mr. Collard, you know I have nothing to do with all the people named here.' And then he pointed out what he called the 'Over' Acts, and I said, 'You know from my statement I am not guilty of all this.'

The Court: —not guilty of all this?

The Witness: Yes.

The Court: *But you were guilty of some of the Overt Acts, weren't you?*

The Witness: No, your Honor.

The Court: I just glanced over here—Act 24, you are mentioned in it, and I saw one or two other places where you are mentioned. I never read this indictment before, but I know at least two places—24, 32—

Mr. Fordell: 29, 30—

The Court: Yes, I know there are a number in which you are mentioned. Did you notice you were mentioned in several of these Overt Acts charged?

The Witness: Yes.

The Court: All right, because you just referred specifically to one which describes something that occurred in Grosse Pointe; you said you weren't there; but there were quite a number of other Overt Acts charged in which your name was mentioned—that is true, isn't it?

The Witness: That my name was listed. But I am not guilty of it, and this is what I talked to Mr.

¹ of the F. B. I.

Collard about, because, I said, 'You have taken my statement, and you know it is not so.' "

The following language from *William v. Kaiser, supra*, seems especially apropos here:

"He needs the aid of counsel lest he be the victim of overzealous prosecutors, of the law's complexity, or of his own ignorance or bewilderment."

CONCLUSION

Upon this record and under the applicable law as expounded by this Court and the provisions of the Vth and VIth Amendments to the Constitution, it is earnestly contended that the writ of certiorari prayed for herein should be granted.

Respectfully submitted,

G. LESLIE FIELD,

*Attorney for Marianna von
Moltke, Petitioner,
415 Dime Building,
Detroit 26, Michigan.*

Supreme Court of the United States

OCTOBER TERM, 1946

No. 1285 73

MARIANNA VON MOLTKE,
Petitioner.

vs.

A. BLAKE GILLIES,
Superintendent of the-Detroit House of Correction,
Respondent

PETITIONER'S MOTION FOR ENLARGEMENT
ON RECOGNIZANCE

G. LESLIE FIELD,
415 Dime Building,
Detroit 26, Michigan,
Attorney for Marianna von
Moltke, Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1946

No. 1285

MARIANNA VON MOLTKE,
Petitioner,

vs.

A. BLAKE GILLIES,
Superintendent of the Detroit House of Correction,
Respondent

**PETITIONER'S MOTION FOR ENLARGEMENT
ON RECOGNIZANCE**

Comes now the petitioner by her attorney and moves the court that she may be enlarged on recognizance pending final decision in this court and for grounds assigns the following:

Petitioner is 50 years of age and the mother of three American-born children, one of whom is a diabetic and in

need of her care and attention. Petitioner's husband is a naturalized American citizen. Petitioner has been in custody and separated from her family since August 24, 1943 and has no criminal record other than that involved in these proceedings. A reasonable doubt as to the validity of petitioner's conviction and sentence is evidenced by the dissenting opinion in the United States Circuit Court of Appeals for the Sixth Circuit in this case.

Wherefore petitioner prays that this motion be granted and that she may be enlarged upon recognizance as this court may direct.

MARIANNA VON MOLTKE,
By G. LESLIE FIELD,
Attorney for Petitioner,
415 Dime Building,
Detroit 26, Michigan.

June 9, 1947.

I, G. Leslie Field, attorney for petitioner in the above-entitled cause, do solemnly swear that the facts recited in the foregoing motion are true to the best of my knowledge and belief.

G. Leslie Field.

Subscribed and sworn to before me June 9, 1947.

Shogarth Altounian,
Notary Public, Wayne County, Michigan.
My commission expires July 24, 1949.

(Notarial Seal)

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OCT 15 1947

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 73

MARIANNA VON MOLTKE,

Petitioner,

vs.

A. BLAKE GILLIES,

Superintendent of the Detroit House of Correction,
Respondent

On Writ of Certiorari to the United States Court of Appeals
for the Sixth Circuit

PETITIONER'S BRIEF

G. LESLIE FIELD,

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PETITIONER'S BRIEF

OPINIONS BELOW

The opinion of the District Court (R. 170-174) is not reported. The majority and dissenting opinions in the Circuit Court of Appeals (R. 182-198) are reported in 161 F. 2d. 113.

JURISDICTION

Jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended, being 28 U. S. C. 347.

QUESTIONS PRESENTED

Did petitioner freely, competently and understandingly waive her constitutional right to have the assistance of counsel in her defense as guaranteed by the Vth Amendment?

Was petitioner coerced, intimidated and deceived by agents of the Federal Bureau of Investigation into pleading guilty to a charge of conspiracy to violate the Espionage Act and waiving her Constitutional right to have the assistance of counsel in her defense and thus deprived of her liberty without due process of law contrary to the provisions of the Vth Amendment?

STATEMENT OF CASE

Petitioner, a middle-aged woman, came to this country with her husband from Germany in 1927 (R. 70). They came to Detroit, Michigan in 1930 (R. 48). The husband became a naturalized citizen and was an instructor of German in Wayne University (R. 48). Petitioner is the mother of three American-born sons (R. 59). The youngest is a diabetic who, at the time of petitioner's arrest, required a supervised diet and two insulin injections daily (R. 48). Petitioner maintained a home for her family and looked after the youngest child constantly (R. 48).

Petitioner knew no English when she came to the United States and testified that she spoke German at home (R.

70). Petitioner's opportunities to learn English were limited as taking care of her home and her sick child took practically all her time (R. 89). She testified that she gained most of her knowledge of English from reading, and listening to the radio (R. 70), that she had a misleading vocabulary, and that she thinks in German and translates into English (R. 71). However, during her 31 months incarceration between her arrest and the hearing on her petition for writ of habeas corpus in the district court, she was able to improve her knowledge of English considerably (R. 71).

Because of her home duties and the diabetic child, petitioner was not active socially, but prior to her arrest she was able to do some volunteer war work and social service which included helping the families of mentally deranged persons at Ypsilanti State Hospital near Detroit (R. 89, 90). She belonged to no social clubs or political organizations (R. 90).

Prior to her arrest, petitioner had had no experience with courts and never had been involved in a court proceeding in any manner (R. 48). She was a housewife and mother (R. 88).

Between 6 and 7 o'clock on the morning of August '24, 1943, six F. B. I. agents came to petitioner's home and arrested her on a presidential warrant as a dangerous enemy alien (R. 48, 49). She was first taken to the Federal Building in Detroit where she was finger-printed, photographed and examined by a doctor after which she was questioned for four days by F. B. I. agents Collard and Hanaway (R. 49, 126, 127). Between questionings she was kept in close confinement at the immigration detention home. The F. B. I. agents were courteous, made no threats, and appeared to be friendly to her. During this period petitioner was not permitted to see her husband but F.

B. I. agent Collard called him on the telephone and obtained information about petitioner's diabetic son which he related to petitioner. She did not know why she was being detained except that she was being held for investigation under a presidential warrant as a dangerous enemy alien (R. 50). She was told by F. B. I. agent Hove that as an enemy alien she was not allowed to have an attorney (R. 50) and one of the officials at the immigration detention home advised her that a notice from the Enemy Alien Hearing Board permitted friends, relatives or counsel to listen in at the hearing but did not allow petitioner to be represented by an attorney (R. 50). On August 28, petitioner's close confinement was discontinued and on September 1, at 10 P. M. she had a hearing before the Enemy Alien Board (R. 49, 88).

About three weeks after her arrest petitioner was handed a lengthy indictment enumerating 47 overt acts charging her with conspiracy to violate the Espionage Act (R. 20-34). She testified that she read the indictment but did not understand it, that no one explained it to her (R. 50), and that she did not know the meaning of the word "conspiracy" or what she called the "over" acts (R. 50, 69, 85, 86, 87).

Three days after receiving the indictment, petitioner and another woman co-defendant were taken to a courtroom in the Federal Building where a criminal trial was in progress (R. 51, 52). The District Judge interrupted the trial and requested the attorney for the defendant in the criminal case being tried before him to represent petitioner and the other woman co-defendant (R. 11, 51, 110, 111). The attorney was reluctant to act but upon being assured by the District Judge that it would be *only for the arraignment and would take only a few minutes*, consented (R. 51, 111). While both women were seated in the courtroom, the reluctant attorney held a hurried

whispered conversation with them. He did not see the indictment, discuss the charges or advise them in any way except to urge them to stand mute, which they did, though petitioner testified that she did not understand the procedure (R. 52, 112). This was the only contact the attorney had with petitioner and the other woman co-defendant. The whole proceeding took only a few minutes (R. 112). Later the same day the attorney entered a written appearance for both women defendants "for arraignment only" (R. 47, 112, 113). Immediately following the arraignment, the District Judge told petitioner he would appoint another attorney to represent her at the trial (R. 53). No attorney was appointed, however, and petitioner waited in vain for one to come and assist her (R. 57). Neither petitioner nor her husband had any means to retain or pay counsel (R. 51, 167, 168).

On September 25, 1943, two attorneys, Okrent and Berger, visited petitioner at the county jail at the request of her husband. Okrent was a former student of petitioner's husband at Wayne University (R. 93, 114). Berger was the senior member of a law firm with which Okrent was associated. Both had been told by petitioner's husband, who had lost his instructor's position shortly following petitioner's arrest and had taken a job at \$35 per week (R. 150, 168), that neither he nor petitioner had any funds or property with which to retain or pay counsel (R. 13). The visit was made primarily to determine facts and to report to petitioner's husband (R. 116). Berger advised petitioner that he and Okrent were not appearing at the jail as her attorneys and that *if she should disclose any information that he thought the Government should know about, he would feel free to report it* (R. 116). Neither of the attorneys advised petitioner regarding her rights or discussed possible defenses to the charges against her (R. 13, 14, 117) and Berger expressly told her they were not

there to advise her (R. 120). The fact that Berger and Okrent were Jews was considered and discussed as a complicating factor (R. 116). Berger and Okrent reported their interview to petitioner's husband and declined to take the case (R. 14, 119).

Petitioner appealed to F. B. I. agents who visited and talked with her at the county jail for advice as to what she should do (R. 96, 121, 122). She testified on cross examination that there was no one else she could ask (R. 96). Two of the agents told her they could not advise her (R. 129, 147). One of them, Dunham, testified (R. 151):

"Mrs. von Moltke was endeavoring to get advice or information from me, or opinions, and yet she realized I couldn't give her opinions, but she tried in the best way she could to get some idea."

Agent Collard, however, undertook to advise her. He had practiced law in Texas before joining the F. B. I. (R. 140) and told petitioner he was a lawyer (R. 56). Collard spent several hours with petitioner in the matron's office at the county jail "explaining" the indictment to her and attempting to define the nature of a conspiracy (R. 55, 141, 142). In doing so he used an example called the "Rum Runners" which she understood as follows (R. 55):

"* * * if there is a group of people in a 'Rum' plan who violate the law, and another person is there and the person doesn't know the people who are planning the violation and doesn't know what is going on, but still after two years this plan is carried out, in the law the man who was present * * * nevertheless is guilty of conspiracy." ¹

¹ Although Collard said he could not remember using the "Rum Runner" example (R. 142), he testified (R. 143): "* * * it is quite possible that Mrs. von Moltke's memory is better than mine, and I may have used such an illustration." Agent Hanaway who worked with Collard on the case and was present at the time the latter explained the indictment to petitioner remembered that he used an illustration but could not recall whether it was the one involving rum runners (R. 129).

Thus advised, petitioner concluded that the mere act of conferring with people who later turned out to be guilty of criminal acts, would make her guilty as a conspirator.² She said to agent Collard (R. 55):

"If that is the law in the United States, I don't know how I ever can prove myself innocent, and how will any judge know how am I guilty if this is the law?"

Collard told her that the probation department would collect the proper data and present it to the judge so that he would "know what to go by" (R. 55), and that she could make a statement to the court at the time sentence was imposed (R. 145).

Sometime between September 23 and October 7, 1943, F. B. I. agent Kirby told another woman defendant in petitioner's presence that he had been in Milan (location of a Federal prison near Detroit) and that the other defendants in the case would plead guilty the following week (R. 84). Petitioner asked Kirby whether she would be allowed to have a trial if all the other defendants pleaded guilty and testified that Kirby said he could not answer the question because "he did not know if this would be all right with the prosecuting attorney" (R. 85).³

² Collard admitted that it was quite possible petitioner asked him at the time of his conference with her concerning the indictment whether "merely conferring with people who later turned out to be guilty of criminal acts would also make her a criminal" but could not recall the particular question (R. 144).

³ Kirby stated that he did not recall making the statement that other defendants were pleading guilty but admitted that petitioner asked him whether she would have the right to a trial if all other defendants pleaded guilty and that to the best of his recollection his answer was that the question of trial would be up to the United States Attorney's office (R. 134).

Believing her case hopeless and that she had no alternative but to plead guilty (R. 58, 78), petitioner made inquiry as to the consequences of such a plea with respect to publicity, place of imprisonment and deportation (R. 58, 59, 101). Assistant United States Attorney Babcock advised her that he had no control over the newspapers or deportation, but that because of her sick child, he would write a letter to the bureau of prisons recommending imprisonment near Detroit (R. 123, 159). He emphasized the fact that his recommendation would not be binding on the bureau and made it clear to petitioner that if she pleaded guilty it would have to be without conditions (R. 125, 164). Petitioner made no request for leniency or other concessions in connection with her inquiry into the probable consequences of a plea of guilty (R. 125, 129, 133, 138, 163). At this time, petitioner spoke to her husband. He advised her not to do anything until she had seen a lawyer (R. 60). Petitioner then told Assistant United States Attorney Babcock or F. B. I. agent Hanaway that she was not ready to plead guilty. This occurred on September 28, 1943 (R. 60).

Shortly afterwards, petitioner was told by a woman co-defendant who was her cellmate, that unless petitioner pleaded guilty, her husband would be implicated (R. 54, 61). Greatly disturbed and troubled by this news, petitioner, in desperation asked to see F. B. I. agent Collard (R. 54, 64). When he arrived at the jail petitioner repeated to him what she had heard and asked him if it was true. Collard told her he could not answer her question (R. 61) which she interpreted as an indication that there was some truth in the report and decided it would be best to plead guilty (R. 62). Up to this time the attorney the district judge before whom she had been arraigned had promised to appoint for her had not appeared (R. 62) though she had waited for him to come (R. 57).

On October 7, 1943, petitioner told F. B. I. agents Hanaway and Collard that she would plead guilty (R. 63). She was taken by them to the Federal Building, where, accompanied by Assistant United States Attorney Babcock and F. B. I. agent Collard, petitioner was taken before a District Judge and, without counsel, signed a partially illegible mimeographed "waiver" (R. 36) which she testified she did not understand (R. 66, 67) but signed because she was told it was "all right" and just a matter of form (R. 67, 109), and pleaded guilty to the charge in the indictment (R. 35).

Before receiving the plea, the District Judge stated to Assistant United States Attorney Babcock that he did not believe he could accept the plea as there was an appearance of an attorney (R. 47) in the file (R. 66, 107, 130). There followed a 5 minute discussion between the District Judge and Babcock (R. 130) with the result that the plea was finally accepted (R. 66, 130, 168).

Prior to accepting the plea, the District Judge asked petitioner if she was pleading guilty because she was guilty and she replied in the affirmative (R. 133, 139); if any threats or promises had been made to her, and she said no; whether she understood the nature of the charges in the indictment and she said she did (R. 139, 160). Petitioner testified that she answered yes when asked whether she understood the charge in the indictment because the indictment had been explained to her by F. B. I. agent Collard (R. 107). Although Assistant United States Attorney Babcock testified that he thought there was a court reporter present in the courtroom at this time, the Government produced no transcript of the proceedings

* F. B. I. agents Hanaway (R. 130), Kirby (R. 132), and Dunham (R. 154) were also present in the courtroom at this time.

(R. 161). Babcock himself had no independent recollection as to the questions asked petitioner by the District Judge, but testified from what he described as the "normal procedure" (R. 160). There is no proof or claim that the District Judge explained the consequences of a plea of guilty to petitioner. The maximum sentence petitioner was subject to was death.⁵

Petitioner testified that she could not remember who handed her the "waiver" or what was said about it (R. 67). She tried to read it and said she thought it meant she was to appear for trial whenever she was wanted and testified that she told Assistant United States Attorney Babcock that she would not sign the paper as she did not want a trial, but that she signed it when he assured her it was all right to do so, and just a matter of form (R. 109, 110). The paper in question, a mimeographed form, is entitled almost illegibly "Waiver of Assignment of Counsel" and purports to waive petitioner's right "to be represented by counsel *at the trial of this cause*" (R. 36; emphasis added).

Petitioner did not talk with her husband again before pleading guilty (R. 104). She felt that she had made a mistake but believed it was not possible to correct it. Shortly after Christmas, 1943, she learned that she could withdraw her plea of guilty and have a trial and also that in the United States under the Constitution, a defendant charged with crime does not have to prove his innocence as is the case in European countries but that it is the duty of the prosecuting attorney to establish guilt (R. 73). She testified that F. B. I. agents Dunham and Collard confirmed the truth of what she had learned (R. 78, 79). F. B. I. agent Kirby testified that sometime

⁵ 50 U. S. C. A. 32, 34.

after the first of 1944 he heard petitioner say that she had made a mistake in pleading guilty (R. 133) and agent Collard testified that petitioner discussed with him her desire to change her plea and that he advised her it was her privilege to do so (R. 145). Prior to pleading guilty, petitioner understood from agent Collard's explanation of the indictment and the "run runner" illustration that it would be up to her to prove her innocence of the charge against her (R. 55, 73, 75, 78).

After considerable delay (R. 43, 45) petitioner was successful in being taken before the District Judge who had presided at her arraignment and she made known to him her desire to withdraw her plea of guilty. He advised her that a motion to that effect should be made by an attorney and appointed Attorney Okrent to represent her for the purpose of making the motion (R. 45).⁶ The motion was finally brought on for hearing on November 15, 1944 (almost a year and three months after petitioner's arrest). Without taking any testimony or permitting petitioner to take the stand, the motion for leave to withdraw the plea of guilty was denied and petitioner was immediately sentenced to four years' imprisonment (R. 8, 46, 47). Thereafter petitioner's writ of habeas corpus was dismissed after hearing in the District Court (R. 175). The judgment of the District Court was affirmed by the Circuit Court of Appeals for the Sixth Circuit, one Judge dissenting (R. 181-198).

⁶ The 10 days allowed by Rule 2 (4), Rules of Procedure for Pleas of Guilty, 18 U. S. C. A. following 688, then in effect, within which to withdraw a plea of guilty had long expired. Cf. *Canizio v. New York*, 327 U. S. 82; *United States v. Smith*, — U. S. —; 67 S. Ct. 1330.

SPECIFICATION OF ERRORS

1. The Circuit Court of Appeals under the undisputed evidence and proofs herein erred in holding that petitioner freely, competently and understandingly waived her Constitutional right to the assistance of counsel in her defense as guaranteed by the VIth Amendment, and in affirming the decision of the District Court on that issue.

2. The Circuit Court of Appeals erred in holding under the undisputed evidence and proofs herein that petitioner was not coerced, intimidated and deceived by agents of the F. B. I. into pleading guilty without the benefit of counsel and thus deprived of her liberty without due process of law contrary to the mandate of the Vth Amendment, and in affirming the decision of the District Court on that question.

SUMMARY OF ARGUMENT

PETITIONER DID NOT FREELY, COMPETENTLY AND UNDERSTANDINGLY WAIVE HER CONSTITUTIONAL RIGHT TO HAVE THE ASSISTANCE OF COUNSEL IN HER DEFENSE AND PLEAD GUILTY TO THE CHARGE IN THE INDICTMENT FOR THE FOLLOWING REASONS:

- (a) Petitioner's background and experience disqualified her from comprehending the lengthy and complex indictment charging her with conspiracy without the assistance of counsel.
- (b) Petitioner was confused and misled as to her right to be represented by counsel in that
 - (1) She was given conflicting and confusing advice as to whether she was entitled to counsel.

- (2) Petitioner was confused and misled by the wholly inadequate and ineffective "assistance" of counsel furnished her at the arraignment.
- (3) Petitioner was confused and misled by the nonappearance of counsel the court promised to appoint for her following the arraignment.
- (c) Petitioner was given erroneous and misleading advice by an agent of the F. B. I. who undertook to explain the indictment and the nature of a conspiracy to her from which she understood that if she went to trial she would have to prove her innocence of the charge and that the case was hopeless.
- (d) Petitioner's plea of guilty was coerced by agents of the F. B. I.
 - (1) F. B. I. agent Collard gave petitioner erroneous and misleading advice as to the indictment, the nature of the charge and her legal rights.
 - (2) F. B. I. agent Collard permitted petitioner to believe there was truth in a report that unless she pleaded guilty her husband would be implicated.
 - (3) F. B. I. agent Kirby gave petitioner to understand that if she were the only defendant not pleading guilty, the question of whether she would be permitted to have a trial would be decided by the United States Attorney's office.
- (e) The purported waiver of counsel signed by petitioner is invalid because
 - (1) The waiver itself is illegible in essential parts including the identifying title, and by its terms

is a waiver of the right to be represented at the trial of the cause;

- (2) Petitioner did not understand and was not advised of the meaning and consequences of the waiver and signed it upon the assurance of the United States attorney in charge of the case that it was just a matter of form;
 - (3) The coercion to which petitioner was subjected vitiated the purported waiver of counsel.
- (f) Petitioner was not apprised of the consequences of waiving counsel and pleading guilty to a charge carrying a maximum penalty of death.

ARGUMENT

PETITIONER DID NOT FREELY, COMPETENTLY AND UNDERSTANDINGLY WAIVE HER CONSTITUTIONAL RIGHT TO HAVE THE ASSISTANCE OF COUNSEL IN HER DEFENSE AND PLEAD GUILTY TO THE CHARGE IN THE INDICTMENT FOR THE FOLLOWING REASONS:

- (a) Petitioner's background and experience disqualified her from comprehending the lengthy and complex indictment charging her with conspiracy without the assistance of counsel.

The Sixth Amendment to the Constitution provides in part

"In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence."

The proofs show that neither petitioner nor her husband had any funds or property with which to retain or pay an attorney. Petitioner therefore was entitled to the protection afforded by the Sixth Amendment unless she competently waived it.

It is conceded here as it was in both the District Court and the Circuit Court of Appeals that an accused may waive his right to counsel, *Adams v. United States ex rel. McCann*, 317 U. S. 269, provided it is done freely and understandingly, *Johnson v. Zerbst*, 304 U. S. 458; *Walker v. Johnston*, 312 U. S. 275.

Tests to determine the validity of such waivers have been announced by this Court and the question is ordinarily one of fact as pointed out in *Johnson v. Zerbst*, *supra*, as follows:

"The determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, *including the background, experience, and conduct of the accused.*" (Italics added.)

Petitioner's Background and Experience

Petitioner knew no English when she arrived in this country with her husband in 1927. Because of her household duties and the attention required by her diabetic son, her opportunities to learn English were limited. She spoke only German at home and learned some English through reading and listening to the radio.¹ Her only activities outside the home were voluntary work done for the American Red Cross, social work at the Y. W. C. A., helping with gasoline rationing, attending P. T. A. meetings and assisting with mentally deranged people at a nearby state hospital. Because of her housework and sick child, however, she was not able to devote much time to these activities. She belonged to no social or political organizations. Shortly after petitioner's arrest, her husband lost his position as instructor at Wayne University and took another job at \$35.00 a week. Prior to her arrest in this case, petitioner had had no contact of any kind with courts and had no knowledge of legal procedure.

Nature of Charge

The indictment to which petitioner pleaded guilty is a lengthy one (R. 20-34) naming eight defendants and six-

¹ Beginning with her arrest petitioner was in custody about 31 months. During that time she was required to speak English and testified that between the time of her arrest and the hearing on her petition for writ of habeas corpus she was able to improve her knowledge of English considerably (R. 71).

teen co-conspirators. Forty-seven overt acts are set forth of which five (R. 29, 31; XXIV, XXIX, XXX, XXXI, XXXII) name petitioner. The indictment charges the defendants with conspiring to violate the Espionage Act of 1917, 50 U. S. C. A. 32 (unlawfully disclosing information affecting national defense).

That the complication of the charge is an important factor in determining whether an accused was wrongfully denied assistance of counsel has been pointed out by this Court in a number of cases. *Tomkins v. Missouri*, 323 U. S. 485; *Rice v. Olson*, 324 U. S. 786; *Hawk v. Olson*, 326 U. S. 271.

Very early during the hearing on the writ of habeas corpus in this case, the District Judge concluded that petitioner was a very intelligent woman (R. 49 and see R. 69, 129) and the majority opinion of the Circuit Court of Appeals states that the record shows her to be extremely intelligent with a remarkable command of the English language for a foreign-born person (R. 183).

Neither petitioner's background and experience nor the record seem to support these conclusions. A mere scanning of her testimony demonstrates, it is believed, that petitioner, even after 31 months of improving her English, had difficulty in making herself understood (e. g. R. 50, 54, 65, 66, 67, 69, 70, 71, 76, 80, 81, 82). It is undisputed that petitioner's experience did not encompass legal proceedings. If intelligence is to be measured by one's ability to put acquired knowledge to use for survival, petitioner failed to pass the test as she exhibited an almost total inability to comprehend and react to forces and events following her arrest. Her self-conviction and imprisonment were the almost inevitable result of fortuitous circumstances over which she had no control (e.g. the non-appearance of counsel promised by the court) and her own

confusion, bewilderment and feelings of helplessness. Petitioner's background and experience did not qualify her to cope with the overwhelming problems that confronted her beginning with her arrest when she was abruptly removed from the quiet routine of her home and plunged into a strange and terrifying world of new relationships where a different and unfamiliar language was spoken and subjected to such experiences as prolonged interrogations by trained criminal investigators, a night hearing before an Enemy Alien Hearing Board, being handed a 17-page indictment couched in legal terms, a court arraignment during which an attorney she had never seen before held a short whispered conversation with her and advised her to "stand mute," the long, futile wait for the attorney the judge promised to send to help her; the appalling "legal" advice given her by an agent of the F. B. I. which convinced her she was doomed and that there was no alternative but to plead guilty, the paralyzing fear that unless she pleaded guilty her husband would be implicated and her children would suffer and the final nightmare of pleading guilty followed, as an anticlimax, by prolonged and unsuccessful efforts to withdraw the plea.

Petitioner was charged with conspiracy to violate the Espionage Act of 1917. A conspiracy is not easy to define.

"It has been said that there is perhaps no crime an exact definition of which is more difficult to give than the offense of conspiracy; a difficulty resulting in a large measure from the fact that the law on the subject of conspiracy, except where settled by legislative enactment, is, beyond certain limits, in a very uncertain state; the cases beyond such limits, which have been adjudged to be conspiracies, appear, it has been said, 'to stand apart by themselves' and to be 'devoid of that analogy to each other which would render them susceptible to classification.'"

12 C. J. 540.

The truth is that lawyers and even judges often have great difficulty in determining what constitutes a conspiracy. *Gebardi v. United States*, 287 U. S. 112; *United States v. Falcone*, 311 U. S. 205; *Hartzel v. United States*, 322 U. S. 680.

This Court recognized the difficulties confronting a defendant charged with conspiracy in *Glasser v. United States*, 315 U. S. 60, where it was pointed out (p. 76):

"In conspiracy cases, where the liberal rules of evidence and the wide latitude accorded the prosecution may, and sometimes do, operate unfairly against an individual defendant, it is especially important that he be given the benefit of the undivided assistance of counsel without the court's becoming a party to encumbering that assistance."²

The seriousness and complication of the charge against an accused are important factors in determining the accused's right to and need for counsel. In *Tomkins v. Missouri*, 323 U. S. 485, the defendant, charged with first degree murder, was not provided with counsel. This Court said:

"* * * the ingredients of the crime of murder in the first degree as distinguished from the lesser offenses are not simple ones but ones over which skilled judges and practitioners have disagreements. The guiding hand of counsel is needed lest the unwary concede that which only bewilderment or ignorance could justify or pay a penalty which is greater than the law of the State exacts for the offense
* * *"

² The quoted language was used with reference to Glasser, a United States District Attorney with four years' experience in criminal cases and is applicable, *a fortiori*, to petitioner who was wholly inexperienced in legal matters. Cf. *Betts v. Brady*, 316 U. S. 455; *United States v. Hill*, 29 F. Supp. 890.

In *Rice v. Olson*, 324 U. S. 786, Rice, an Indian, without benefit of counsel, pleaded guilty to a charge of burglary. It subsequently appeared that the offense had been committed on a Government Indian Reservation. This Court stated:

"The petitioner's need for legal counsel in this case is strikingly emphasized by the allegation in his habeas corpus petition that the offense for which the state court convicted him was committed on a government Indian Reservation 'without and beyond the jurisdiction of the Court.' This raises an involved question of federal jurisdiction, posing a problem that is obviously beyond the capacity of even an intelligent and educated layman, and which clearly demands the counsel of experience and skill."

In his dissenting opinion in *Foster v. Illinois*, — U. S. —, 67 S. Ct. 1716, Mr. Justice Rutledge wrote:

"Here petitioners were charged with the serious crimes of burglary and larceny * * * Every lawyer knows the difficulties of pleading to such charges, including the technicalities of the applicable statutes and especially of the practice relating to included or lesser offenses."

See also *Hawk v. Olson*, 326 U. S. 271.

The contention implicit in the opinion of the District Judge and in the majority opinion in the Circuit Court of Appeals that petitioner easily could have determined for herself whether or not she was guilty of the charge set forth in the voluminous indictment, is, it is submitted, unwarranted and insupportable. The assumption underlying this contention is that guilt or innocence can readily be determined by the simple process of "searching one's conscience." Assistant United States Attorney Babcock advised petitioner that she would have to decide for her-

self on the basis of her own conscience whether to plead guilty (R. 159) and F. B. I. agent Collard told her when she asked him whether she should plead guilty or not guilty that "it was a matter strictly for her, and for nobody else" (R. 137). Attorney Berger who visited petitioner at the jail but declined to represent her testified (R. 120): "And I again reiterated to her that I am not going to advise you whether you should plead guilty or whether you should not; if you are guilty, plead guilty; and if you are not, do not; and I cannot and Okrent cannot tell you yes or no on the thing * * *." When asked by the court whether he told petitioner to plead guilty if she were guilty and if she were not guilty, not to plead guilty, Berger testified (R. 120): "Something to that effect; that I am not here to advise you."

These repeated intimations that petitioner could and must determine her own guilt or innocence without the aid of counsel grossly oversimplified and misrepresented intricate problems of fact and law. If it were true that laymen easily can determine their own guilt or innocence without the help of counsel, the Constitutional guarantee of assistance of counsel would be unnecessary and the admonitions of this Court as to the ability of laymen to cope with the criminal proceedings would be superfluous. The cold truth of the matter is that determination of guilt or innocence is one of the knottiest and most difficult processes in the administration of justice. For a case in point see *United States v. Heine*, 151 F. 2d 813, C. C. A. 3. If petitioner were to be expected to fathom guilt or innocence by searching her conscience, she should have been provided with competent legal counsel to accompany and guide her on the search.

It is stated in the majority opinion of the Circuit Court of Appeals that petitioner's own testimony contradicts

her statement that she did not understand the charge (R. 184). On cross-examination petitioner admitted that she had read the indictment and that she felt she was innocent of the charges (R. 90, 91). From this it is contended that petitioner must have known what the charges were, but it is submitted that this conclusion is a *non sequitur*. The key word in the question put to petitioner on cross-examination was the word "innocence" and what petitioner obviously was attempting to do was to protest her innocence. She was easily tricked into overlooking that part of the question which implied understanding of the nature of the charges and eagerly answering the portion which gave her an opportunity to assert her innocence. Her subsequent answers show clearly that she was referring to the overt acts rather than the charge (R. 75, 76).

A good example of petitioner's confusion and inability to understand the nature of the charge was her repeated denial that she had ever been in Grosse Pointe (a suburb of Detroit) as stated in overt act XXXI (R. 31) and her statement that therefore she was not guilty (R. 63, 65, 68). Apparently puzzled, the District Judge questioned petitioner on the point as follows (R. 68, 69).

"Q. (By Mr. Kronner): Did you know, Mrs. Von Moltke, what the charges against you were, from a reading of the indictment?

A. You mean what the accusation was?

Q. Yes.

A. I knew I had never been in Grosse Pointe.

Mr. Fordell: That is not responsive to the question.

The Court: When you refer to that fact—you knew you were not in Grosse Pointe—why did you say that, why did you give that answer?

The Witness: Because what I read in the accusations, I felt I was not guilty of it and I talked this

over with Mr. Collard,³ because Mr. Collard took my statement, and he knew that I had told the truth and that I was not guilty of the 'over' acts."

For another example see R. 77-78.

In the light, therefore, of petitioner's background and experience and the complicated nature of the charge brought against her, it is idle to say that she was competent to comprehend the nature of the charge and to make an intelligent determination of her guilt or innocence without the assistance of counsel. *Glasser v. United States*, *supra*; *Johnson v. Zerbst*, *supra*.

(b) Petitioner was confused and misled as to her right to be represented by counsel in that

- (1) She was given conflicting and confusing advice as to whether she was entitled to counsel.**

When petitioner was first taken into custody she was told by F. B. I. agent Hove that as an enemy alien she was not entitled to counsel (R. 50) and later an immigration officer told her that she would not be allowed to have counsel before the Enemy Alien Hearing Board, though friends or relatives would be permitted to attend the hearing (R. 50). No one explained to petitioner when she was handed the indictment that thenceforth she was entitled to the assistance of counsel (R. 51). Assistant U. S. Attorney Babcock admitted that he did not point out to petitioner that there was a difference between the two proceedings (R. 164, 165) though he questioned her at the hearing before the Enemy Alien Hearing Board, conferred with her twice before she pleaded guilty (R. 58, 158) and appeared with her before the court when the plea was

³ of the F. B. I.

entered (R. 65-67). Petitioner testified that she never knew there was any difference between the two proceedings (R. 167, 170).

It is true F. B. I. agent Collard testified that five days before she pleaded guilty, he told petitioner that "technically she had been re-arrested on that indictment" (R. 141), but he did not testify and there is no claim that he or anyone else explained to her that beginning with her "technical" re-arrest she was entitled to counsel. Obviously petitioner with no knowledge of legal procedure could not be expected to draw that conclusion. The record shows petitioner was informed by the court at the time of her arraignment that she was entitled to counsel (R. 51) but this was followed by a wholly inadequate and perfunctory example of legal representation on arraignment and the subsequent nonappearance of counsel the court promised to appoint to represent her at the trial.

It may be contended that petitioner should have accepted as conclusive the statement of the court as to her right to counsel. It should be noted, however, that petitioner received conflicting advice as to her right to have counsel from apparently authoritative sources, that she was ignorant of legal proceedings, and that she was incapable of resolving the conflict. It cannot be denied upon this record that so far as the Constitutional guarantee of assistance of counsel was concerned, the case against petitioner got off to a bad start.

(2) Petitioner was confused and misled by the wholly inadequate and ineffective "assistance" of counsel furnished her at the arraignment.

(3) Petitioner was confused and misled by the nonappearance of counsel the court promised to appoint for her following the arraignment.

The importance of counsel to an accused in a criminal prosecution was most forcefully stated in *Powell v. Alabama*, 287 U. S. 45 (p. 69) as follows:

"Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with a crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."

Equally vital to an accused is assistance of counsel in connection with a plea of guilty, as was pointed out in *Williams v. Kaiser*; 323 U. S. 471, p. 475 (referring to the above-quoted language) as follows:

"Those observations are as pertinent in connection with the accused's plea as they are in the conduct of a trial. The decision to plead guilty is a decision to allow a judgment of conviction to be entered without a hearing—a decision which is irrevo-

cable and forecloses any possibility of establishing innocence * * * Only counsel could discern from the facts whether a plea of not guilty to the defense charged or a plea of guilty to a lesser offense would be appropriate. A layman is usually no match for the skilled prosecutor whom he confronts in the court room. He needs the aid of counsel lest he be the victim of overzealous prosecutors, of the law's complexity, or of his own ignorance or bewilderment."

Compliance with the Constitutional guarantee of assistance of counsel must be more than formal; it must be substantial and effective. *Powell v. Alabama, supra; Hawk v. Olson, supra.*

In *Powell v. Alabama*, the trial court appointed all the members of the bar of the county to represent three defendants, charged with rape, at their arraignment and stated "then of course I anticipated them to continue to help them if no counsel appears." Counsel did represent the defendants at the trial but without preparation and ineffectively. The record shows the representation to have been *pro forma*. The defendants were convicted and sentenced to death. This Court designated the action of the trial judge in appointing the entire county bar to represent defendants as little more than an expansive gesture and said:

"* * * during the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself."

Similarly in *Hawk v. Olson, supra*, this Court said:

“ * * * the importance of the assistance of counsel in a serious criminal charge after arraignment is too large to permit speculation on its effect. We hold that denial of opportunity to consult with counsel on any material step after indictment or similar charge and arraignment violates the Fourteenth Amendment.”

The facts as to the kind of representation of counsel petitioner was furnished at her arraignment are undisputed. An attorney then trying a criminal case was asked by the presiding judge to represent petitioner and a woman co-defendant on their arraignment. He objected but his objections were overcome by the judge who told him it would be only for the arraignment and would take only a few minutes. The attorney had never seen either petitioner or her co-defendant before. He went over to where they were seated in the courtroom and, bending over, held a whispered conversation with them. He did not see the indictment or advise them as to the charge. He asked them “both at once” whether they understood “what this is all about” and testified the “one or the other of them said, yes, they did understand and the other indicated that she, too, understood.” He then asked them if they felt they were guilty or not guilty, and both indicated they were not guilty. He testified: “I then rather hurriedly explained to them the advantage of standing mute as against pleading not guilty at that moment, and it was agreed that they would both be stood mute.” He further testified (R. 112):

* In connection with this testimony, the majority opinion in the Circuit Court of Appeals refers to the attorney who appeared for petitioner on arraignment as a “disinterested witness” (R. 183).

“Q. And then what happened?

A. Well, I took them both up before the Court; I believe that Judge Moinet was sitting there all the time; and we came up before the clerk's bench, and I indicated to the Court that both defendants were standing mute.

Q. Do you recall whether Judge Moinet said, while you were there, that he would appoint counsel for Mrs. von Moltke?

A. I am not too sure of that. I do know that it was definitely understood that I was to represent them on the arraignment only.

Q. How long did this conversation that you had with Mrs. von Moltke and Mrs. Leonhardt—how long a time did that occupy?

A. Just a matter of a couple of minutes.

Q. And as I understand it, it was a whispered conversation?

A. That is right.

Q. Entirely?

A. Yes.

Q. You did not have the indictment?

A. No, I did not.

Q. You did not advise them of the nature of the charges?

A. No, I did not.

Q. You did not advise them on anything excepting as to the advisability of standing mute?

A. That is correct.

Q. Was that the extent of the service, of the legal assistance that you gave Mrs. Leonhardt and Mrs. von Moltke?

A. Yes, I had no further contact with them.

Q. Did you enter your appearance formally for them?

A. Yes, later on that day.”

The special appearance for arraignment only was duly filed in accordance with the order of the District Judge (R. 47).

It is not believed that the Government will contend that the representation afforded petitioner on her arraignment satisfied either the mandate of the Sixth Amendment or the rulings of this Court. It may be argued that, admitting the inadequacy of this perfunctory "assistance" of counsel, nevertheless petitioner finally waived her right to counsel and the error, if any, was cured. This argument, however, overlooks entirely the causal connection between the inadequate representation and the final plea of guilty. It is submitted that the example of legal assistance given petitioner at the arraignment cannot be isolated but must be considered in relationship to preceding and subsequent events—events that controlled and determined the final result.

Petitioner was entitled to exclusive, continuous and effective assistance of counsel. *Glasser v. United States, supra*; *Hawk & Olson, supra*. The assistance of counsel provided for her at the arraignment was not exclusive as the attorney represented two defendants indiscriminately; it was obviously not continuous as it terminated as abruptly as it began; and it was unquestionably ineffective.

Petitioner needed and was entitled to counsel qualified, willing and able to spend the time necessary to advise her as to the nature of charge and her legal rights. Had such assistance been furnished at or prior to arraignment, it is reasonable to assume that the whole course of events would have been changed and petitioner's case heard, if at all, on the merits.

After the plea of not guilty was entered at the arraignment, petitioner testified that the following occurred (R. 53):

"Q. Now then, do you recall whether or not Judge Moinet made any further statement about an attorney?

A. Judge Moinet said he would appoint an attorney right away, and I understood that the gentleman was to be expected to come right away."

Petitioner was arraigned on September 21, 1943. Four days later she was visited by attorneys Berger and Okrent. The latter inquired whether she was to have counsel and she told him the court was going to appoint one for her (R. 93). She testified (R. 57):

"Q. Up to that time had any other attorney advised you?

A. No, sir.

Q. Were you waiting for any attorney?

A. I was waiting for an attorney.

Q. What attorney?

A. Please?

Q. What attorney were you waiting for?

A. The attorney which Judge Moinet was going to appoint for me."

Agents of the F. B. I. who visited petitioner at the jail at this time asked her whether she had seen her attorney. She told them she had not and they made no comment (R. 65, 84). She testified: "I just was wondering about the lawyer who never came" (R. 103).

Petitioner's testimony as to the court's promise to appoint another attorney for her following the arraignment and the fact that no attorney appeared to counsel or assist her stands undisputed. Judge Moinet before whom petitioner was arraigned did not testify.

It can hardly be argued that the nonappearance of the promised attorney could have been anything but confusing to petitioner. The admitted failure of counsel to appear

lends considerable weight to petitioner's testimony that "I even did not know whether I was really entitled to counsel" (R. 106). There can be no denial of the fact that petitioner was entitled to have the effective assistance of counsel at every step of the proceedings, particularly during the critical period between arraignment and trial. *Powell v. Alabama, supra; Hawk v. Olson, supra.*

- (c) Petitioner was given erroneous and misleading advice by an agent of the F. B. I. who undertook to explain the indictment and the nature of a conspiracy to her from which she understood that if she went to trial she would have to prove her innocence of the charge and that the case was hopeless.

When the attorney promised by the court failed to put in his appearance, petitioner turned to agents of the F. B. I. who visited and discussed the case with her at the jail for advice and information. She testified on cross-examination (R. 96):

"Q. Now, isn't it true that up until the time you pleaded guilty you repeatedly asked the agents for advice as to whether you should plead guilty or not? Isn't that true?

A. There was nobody else I could ask.

Q. Well, just say yes or no.

A. Yes."

She asked agent Hanaway to explain the indictment to her but he refused (R. 121) telling her he was not a criminal attorney (R. 129). Agent Dunham also was asked by her to explain the indictment and the nature of the charges, but he likewise declined to do so (R. 147).

F. B. I. agent Collard, however, was more accommodating. He had practiced law in Texas before joining the

F. B. I. He was the agent who had arrested petitioner on the presidential warrant and with agent Hanaway had interrogated her for four days following her arrest. Petitioner knew that he was an attorney because he told her so (R. 56). At petitioner's request, Collard spent several hours with her in the matron's office at the jail explaining the indictment and the nature of a conspiracy (R. 141, 142). Petitioner testified that Collard explained the indictment to her by an example which he called the "rum runners" and said (R. 55): "This is what I understood: That if there is a group of people in a 'Rum' plan who violate the law, and another person is there and * * * doesn't know the people who are planning the violation and doesn't know what is going on, but still it seemed after two years plan is carried out, in the law the man who was present becomes * * * guilty of conspiracy." Petitioner concluded from this that the mere act of conferring with people who later turned out to be guilty of criminal acts would also make her guilty and she said to Collard (R. 55):

"If that is the law in the United States, I don't know how I ever can prove myself innocent, and how will any judge know how am I guilty if this is the law?"

Collard then told her that the probation department (of which she had not heard before) would collect the proper data and present it to the judge so that he would "know what to go by."⁵

As a result of her interview with Collard, petitioner concluded that she had the burden of proving herself

⁵ Agent Dunham testified that petitioner asked him about the probation department and that he explained to her that the officers conducted an investigation into her life and made a recommendation prior to sentence (R. 154).

innocent and that if the law was as Collard explained it, her case was hopeless (R. 55, 75, 78).

It is quite apparent that Collard's explanation of the nature of a conspiracy was erroneous and misleading. Mere passive cognizance of the crime or unlawful act to be committed or mere negative acquiescence is not sufficient to make one guilty of conspiracy. *11 Am. Jur.* 544. Cf. *Smith v. O'Grady*, 312 U. S. 329 where petitioner was advised by the trial judge that his only relief from illegal imprisonment was by application to the Parole and Pardon Board.)

The foregoing testimony shows beyond question that petitioner was misled and deceived by Collard as to her legal rights. Her testimony clearly demonstrates that the erroneous advice and explanations given by Collard greatly influenced her subsequent thoughts and actions and counted heavily in coercing her plea of guilty (R. 55, 75). Petitioner's disastrous interview with Collard should not be considered as an isolated incident but should be evaluated with preceding related events, namely, the sketchy and off hand example of assistance of counsel furnished petitioner at the arraignment and the nonappearance thereafter of counsel the court promised to appoint for her. So viewed, the events appear as a pattern of official indifference to petitioner's Constitutional right of counsel and a callous disregard of her extreme need for substantial and effective assistance of counsel.

As was appropriately pointed out in *Powell v. Alabama*, *supra*:

"Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evi-

dence. * * * He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."

Equally illuminating is the following language from *Johnson v. Zerbst*, *supra*:

"The Sixth Amendment guarantees that: 'In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence.' This is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty. * * * The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done.' It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel. That which is simple, orderly, and necessary to the lawyer—to the untrained layman—may appear intricate, complex, and mysterious."

In *Carter v. Illinois*, 329 U. S. 173, the following observation was made:

"There are situations when justice cannot be administered unless persons charged with crime are defended by capable and responsible counsel."

It is submitted that the case at bar presents such a situation.

(d) Petitioner's plea of guilty was coerced by agents of the F. B. I.

- (1) F. B. I. agent Collard gave petitioner erroneous and misleading advice as to the indictment, the nature of the charge and her legal rights.
- (2) F. B. I. agent Collard permitted petitioner to believe there was truth in a report that unless she pleaded guilty her husband would be implicated.
- (3) F. B. I. agent Kirby gave petitioner to understand that if she were the only defendant not pleading guilty, the question of whether she would be permitted to have a trial would be decided by the United States Attorney's office.

- (1) F. B. I. agent Collard gave petitioner erroneous and misleading advice as to the indictment, the nature of the charge and her legal rights.

The facts concerning the erroneous and misleading advice given petitioner by agent Collard are set forth under (c) above and are adopted under this classification without repetition. Whether petitioner's plea was coerced as a result of this advice, alone or in conjunction with the other facts set forth under (d) (2) and (3) above, will be discussed under this heading.

"Although it is difficult to define coercion sharply, coercion exists where one is, by the unlawful conduct of another, induced to do or perform some act under circumstances which deprive him of the exercise of his free will." 11 C. J. 946.

That petitioner was misinformed, misled, and deceived by F. B. I. agent Collard can scarcely be denied upon this record. As a direct and immediate result of his erroneous legal advice petitioner was led to believe that (a) conferring however innocently with people who afterwards turned out to be guilty of criminal acts made her guilty of conspiracy under the law of the United States (b) if she went to trial the burden would be upon her to prove her innocence and (c) that her case was hopeless with no alternative but to plead guilty and permit the probation department to explain the circumstances to the sentencing judge. To deny that these induced beliefs did not overpower petitioner's will and leave her no alternative but to plead guilty is to shut one's eyes to the undisputed evidence in the record. Under any definition of the term, it is submitted that petitioner was induced to plead guilty under circumstances which deprived her of her free will and that this constituted coercion. It was held by this Court in *Waley v. Johnston*, 316 U. S. 101, that "a conviction on a plea of guilty coerced by a federal law enforcement officer is no more consistent with due process than a conviction supported by a coerced confession." In *Walker v. Johnston*, 312 U. S. 275, this Court stated: "If he (petitioner) did not voluntarily waive his right to counsel, or if he was deceived or coerced by the prosecutor into entering a guilty plea, he was deprived of a constitutional right."

See also *Smith v. O'Grady*, 312 U. S. 329.

- (2) F. B. I. agent Collard permitted petitioner to believe there was truth in a report that unless she pleaded guilty her husband would be implicated.

Prior to her arrest, petitioner took care of her diabetic son constantly. After the arrest, her husband looked after the boy who was finally placed in a home some three months later. In the interim he was cared for by some neighbors, but because it was a complicated case, they did not wish to continue caring for him. A few days after petitioner's arrest, her husband lost his position as instructor at Wayne University and took a job that paid \$35.00 a week—a sharp reduction in income. Petitioner was greatly concerned about the boy and when, shortly after her legal conference with F. B. I. agent Collard, she heard a report that unless she pleaded guilty her husband would be implicated in the case, she became greatly alarmed and asked to speak to Collard. When he arrived, she repeated to him what she had heard and asked him if there was any truth in the report. He told her he could not answer the question which petitioner construed as meaning there was some truth in what she had heard. Greatly troubled, confused and desperate and fearful that there would be no one to look after the diabetic boy, petitioner told F. B. I. agents Hanaway and Collard that she was ready to plead guilty. She was immediately taken before a Federal Judge where she entered her plea.

The foregoing facts are undisputed.

Any attorney undoubtedly would have been able to quiet petitioner's fears by pointing out that her husband's implication or nonimplication in the case could not depend upon whether she pleaded guilty but would depend entirely upon evidence pointing to his guilt. But "that which is simple, orderly, and necessary to the lawyer—to the un-

trained layman—may appear intricate, complex and mysterious.”⁶ Unadvised and under circumstances of extreme emotional stress, petitioner was unable to reach any other conclusion than that she must plead guilty. Obviously at this stage of the proceedings, petitioner stood in sore need of the kind of legal assistance contemplated by the Sixth Amendment.

- (3) F. B. I. agent Kirby gave petitioner to understand that if she were the only defendant not pleading guilty, the question of whether she would be permitted to have a trial would be decided by the United States Attorney’s office.

Kirby visited and talked with petitioner at the county jail on a number of occasions after her arraignment and before she pleaded guilty. On one of these visits petitioner testified he stated in her presence that he had been in Milan (location of a Federal prison near Detroit) and that the other defendants in the case would plead guilty the following week (R. 85).⁷ Kirby did not deny this but testified that he did not recall making the statement (R. 134). However, he at least partially confirmed petitioner’s testimony as follows (R. 134):

“Q. And did she (petitioner) ask you that if all the other defendants pleaded guilty whether she would have a right to a trial?”

A. I believe she did ask me that question on one occasion.

Q. And did you answer that question?

A. To the best of my recollection, my answer was that the question of trial would be up to the United States Attorney’s office.”

⁶ *Johnson v. Zerbst*, *supra*.

⁷ All other defendants did not plead guilty. *Thomas v. United States*, 151 F. 2d 183, C. C. A. 6.

Petitioner was entitled to know that her right to a trial was guaranteed by the Sixth Amendment. No one advised her of this, however, and Kirby's statement was obviously both misleading and untrue. In effect, petitioner was told that if she did not plead guilty, it was at least questionable whether she would be permitted to have a trial.

The Fifth Amendment provides that no person shall be "deprived of life, liberty, or property without 'due process of law.'" If the record shows, and it is earnestly contended that it does show, that petitioner's plea of guilty was coerced by federal law enforcement officers, her conviction was contrary to and in violation of the due process mandate of the Fifth Amendment and therefore invalid. *Waley v. Johnston, supra; Walker v. Johnston, supra.* Cf. *Smith v. O'Grady, supra.*

(e) The purported waiver of counsel signed by petitioner is invalid because

- (1) The waiver itself is illegible in essential parts including the identifying title, and by its terms is a waiver of the right to be represented at the trial of the cause;
- (2) Petitioner did not understand and was not advised of the meaning and consequences of the waiver and signed it upon the assurance of the United States attorney in charge of the case that it was just a matter of form;
- (3) The coercion to which petitioner was subjected vitiated the purported waiver of counsel.

- (1) The waiver itself is illegible in essential parts including the identifying title, and by its terms is a waiver of the right to be represented at the trial of the cause.

At the time petitioner pleaded guilty, she was handed a poorly mimeographed form to sign (R. 36, 67, 108-110). Parts of the form (R. 36) are very difficult to read, particularly the title which, *if it had been properly typewritten or mimeographed*, would have read: WAIVER OF ASSIGNMENT OF COUNSEL. The fact is, however, that this, perhaps the most important part of the instrument so far as the accused is concerned, is all but illegible. A defendant who signs away an important constitutional right should be entitled to a legible instrument with a readable title.

The body of the instrument reads in part:

"I * * * do hereby * * * waive * * * my right to be represented by counsel *at the trial of this cause.*" (Italics supplied.)

The instrument in question does not support the contention that petitioner waived assistance of counsel in connection with her plea of guilty and it is clear from the record that petitioner did not understand the proceeding at which she pleaded guilty to be a trial (R. 109). The record does not show that petitioner waived her right to counsel in connection with her plea of guilty, at which time the assistance of counsel was vital to her. *Williams v. Kaiser, supra.*

- (2) Petitioner misunderstood and was not advised of the meaning and consequences of the waiver and signed it upon the assurance of the United States attorney in charge of the case that it was just a matter of form.

The record indicates considerable confusion concerning the purported waiver of counsel. The confusion was by no means confined to petitioner. Assistant United States Attorney Babcock who appeared with petitioner when she pleaded guilty testified that he had no definite recollection of her signing the purported waiver (R. 162) and also that he did have an independent recollection that she signed it (R. 165). He admitted that he did not explain the meaning of the waiver to petitioner and stated that he had no distinct recollection of the District Judge explaining the waiver but testified: "If any of our Judges have missed doing that, I would have remembered that very distinctly." (R. 166).

F. B. I. agents Collard, Hanaway, Kirby and Dunham were present in the courtroom when petitioner pleaded guilty and testified concerning the proceedings. None of them said anything about the purported waiver having been explained to petitioner. Agent Kirby admitted on direct examination that he had no independent recollection of petitioner signing any paper at that time (R. 133).

No record of the proceedings before the District Judge who accepted the plea was introduced into evidence at the habeas corpus proceeding although Assistant United States Attorney Babcock testified that according to his remembrance there was a court reporter in the courtroom at the time (R. 161).

It is quite evident from the record that petitioner herself was considerably confused as to the purported waiver. On cross-examination petitioner testified (R. 108, 109):

"Q. And then the Judge asked you whether you wanted an attorney?

A. I do not remember that he asked me that question.

Q. Did he ask you to sign something?

A. No. A note was given to me, and I don't know who gave it to me.

Q. Did you sign it?

A. Yes, after I asked Mr. Babcock about it.

Q. Did you read it?

A. I read it.

Q. What do you remember reading?

A. I remember that it was said that I was to appear for trial in court if I was requested to do so, and I did not want that.

Q. Did you sign it?

A. I asked Mr. Babcock what that trial affair means, and Mr. Babcock said that it is more or less a—I understood that a matter of form, and he said that is all right, you can sign this. And I signed it."

* * * * *

Petitioner was under the impression that what she signed was small piece of paper. The court questioned her as follows (R. 109, 110):

"The Court: You said that you did not think the paper was as large as the one counsel offered you. It may be because that is a photostatic copy, and is

black, and it looks larger. Was that the type,—look at that paper.

A. Yes, but I cannot remember—

The Court: That is the form that is used?

A. Well, I think that—I tell the truth, your Honor. I cannot remember.

The Court: Do you remember reading something?

A. Something about appearing for trial.*

The Court: Oh, well, there is nothing on this about appearing for trial."

Petitioner's testimony on direct examination as to the purported waiver is consistent with that quoted above and indicates that she misconceived the purport and meaning of the instrument she signed (R. 66, 67).

(3) The coercion to which petition was subjected vitiated the purported waiver of counsel.

In *Waley v. Johnston*, *supra*, this Court held:

"And if his plea was so coerced as to deprive it of validity to support the conviction, the coercion likewise deprived it of validity as a waiver of his right to assail the conviction."

Applied to petitioner's case, this holding would strike down as invalid an instrument executed to facilitate a coerced plea of guilty.

* The concluding words in the body of the purported waiver are "at the trial of this cause" (R. 36).

Presumption Against Waiver of Fundamental Rights

There is a presumption against waiver of fundamental rights, *Johnson v. Zerbst, supra*; *Glasser v. United States, supra*, and a plea of guilty does not *ipso facto* constitute a waiver of the right to assistance of counsel, *Rice v. Olson, supra*.

¶ In *Johnson v. Zerbst, supra*, this Court made the following observation:

“It has been pointed out that ‘courts indulge every reasonable presumption against waiver’ of fundamental constitutional rights and that we ‘do not presume acquiescence in the loss of fundamental rights.’ ”

And in *Glasser v. United States, supra*, this Court stated:

“To preserve the protection of the Bill of Rights for hard-pressed defendants, we indulge every reasonable presumption against waiver of fundamental rights.”⁹

The question of whether there was a valid and competent waiver of counsel imposes a great responsibility upon the trial judge and, as has been pointed out by this Court, there should be a record of the trial judge's determination upon this point. *Johnson v. Zerbst, supra*; *Glasser v. United States, supra*.¹⁰

⁹ Cf. *Adams v. United States ex rel. McCann, supra*, where the defendant, familiar with trial and appellate procedure, refused proffered assistance of counsel, stating that no attorney could represent him as well as he could represent himself, and signed a written waiver of trial by jury.

¹⁰ See also, for an adoption of this suggestion, Michigan Court Rule 35A effective September 1, 1947 following decision of this Court in *De Meerleer v. Michigan*, 329 U. S. 663.

Some point is made in the majority opinion of the Circuit Court of Appeals that petitioner stated on several occasions she did not wish to consult an attorney and wanted to settle the matter herself (R. 185, 186). This testimony should be considered in the light of petitioner's previous experience with assistance of counsel at the arraignment; the unfulfilled promise of counsel after arraignment and the legal advice given petitioner by F. B. I. agent Collard which convinced her that her case was hopeless. Thus conditioned, it is understandable why petitioner would be skeptical about the help she might expect to receive from counsel. F. B. I. agent Dunham summed up the situation neatly when he testified that petitioner did not feel that discussing the matter with a lawyer would be of much assistance to her because her consideration was not only for herself, but for her husband and family (R. 148). Petitioner, however, denied that she ever refused the assistance of counsel or that she stated she did not want counsel. But even assuming *arguendo* that petitioner did refuse the assistance of counsel, this by no means disposes of the question. *Adams v. United States ex rel. McCann, supra*. Under the rulings of this Court, the test is not whether an accused refused the aid of counsel, but rather whether he did so freely, competently and understandingly, which necessarily raises questions of law and fact. To contend that because petitioner refused to consult counsel she validly waived her rights in that respect is to grossly oversimplify the problem involved and to disregard voluminous and convincing evidence and proofs to the contrary. F. B. I. agent Dunham's admission that petitioner was endeavoring to get advice or information from him and that she "tried in the best way she could to get some idea" (R. 151) is convincing evidence of petitioner's desperate attempt to get advice and her great need for counsel. Testimony of agents Dunham and Collard that they advised petitioner to speak

to her attorney is met by two undisputed facts: neither petitioner nor her husband had any funds to retain an attorney, and the attorney the court promised to send to her and whom she expected never came.

At the time petitioner signed the "waiver" and pleaded guilty she understood, as a result of her conference with F. B. I. agent Collard, that she would have the burden of proving her innocence of the charge if she went to trial, and she was convinced that her case was hopeless by the definition of conspiracy given her by Collard. Petitioner did not learn that in the United States there is a presumption of innocence and that the prosecution has the burden of establishing guilt until about two and a half months after she pleaded guilty (R. 73). Petitioner's information on this point was confirmed by F. B. I. agent Dunham (R. 78). When petitioner was asked in the trial court whether she would have pleaded guilty had she known these facts beforehand (R. 73) the Government attorney objected on the ground that "there mere fact that she found out later that it *might have been tough for the Government to prove the case* doesn't establish that she didn't enter her plea intelligently" (R. 74; emphasis added). It is submitted, however, that a plea of guilty made by one who does not understand the nature of the charge or the elements of the offense for which he has been indicted and is made under a misapprehension as to material facts (which could or might have been corrected by assisting counsel) is not a free and voluntary admission of guilt or a valid waiver of the right to have the assistance of counsel. See *Parker v. Johnson*, 29 F. Supp. 829, and *McDonald v. Johnston*, 62 F. Supp. 830.

A point is made in the majority opinion of the Circuit Court of Appeals (R. 186) that petitioner was advised by one judge that she was entitled to counsel, and that a sec-

and judge asked her specifically whether she wished to be represented by counsel. Sufficient reference has heretofore been made to the inadequate representation petitioner was furnished at her arraignment, and to the failure of the court to appoint counsel to represent petitioner thereafter as promised, to indicate how thoroughly petitioner was confused and discouraged by these experiences. As to being interrogated by the second judge, it may be conceded that routine questions were put to petitioner, though the record falls far short of showing compliance with the requirements of this Court with respect to the duty of a trial judge in connection with determining the validity of waiver of counsel (*Johnson v. Zerbst, supra*), and it must be remembered that the questions were asked after petitioner had been conditioned into a state of abject acquiescence by the unlawful acts she charges violated her Constitutional rights.

It is submitted that under the circumstances shown by this record, the presumption against waiver of fundamental rights is strikingly applicable.

(f) Petitioner was not apprised of the consequences of waiving counsel and pleading guilty to a charge carrying a maximum penalty of death.

In *Johnson v. Zerbst, supra*, this Court adverted to the duty of a trial judge in connection with waivers of right to counsel and said:

“The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of the trial court, in which the accused—whose life or liberty are at stake—is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused * * * and it would be fitting and

appropriate for that determination to appear upon the record."

In connection with such an investigation it would appear imperative that the accused be advised of the maximum penalty to which he exposes himself by a waiver of counsel and a plea of guilty, particularly in a capital case.

There is no showing whatsoever that petitioner was advised by anyone that the maximum penalty for the crime with which she was charged was death. She was not apprised of the consequences of waiving her right to counsel or of pleading guilty. Without this information, it is submitted that petitioner could not intelligently and competently waive her right to counsel and plead guilty. See *Foster v. Illinois*, — U. S. —, 67 S. Ct. 1716; *Carter v. Illinois*, 329 U. S. 173; *De Meerleer v. Michigan*, 329 U. S. 663.

The following facts are undisputed on this record:

1. Petitioner was not advised that there was a difference between the proceedings initiated by her arrest on presidential warrant and the criminal proceedings under the indictment with respect to her right to counsel.
2. Though without funds petitioner was not provided with effective assistance of counsel at any stage of the proceedings against her.
3. Counsel the court promised to appoint for petitioner was not appointed though petitioner waited for him to appear.
4. Petitioner was given misleading and erroneous information by F. B. I. agent Collard concerning the indictment, the charge and her rights.

5. Petitioner was permitted to understand by F. B. I. agent Kirby that if she were the only defendant not pleading guilty, the question of whether she could have a trial would be decided by the United States Attorney's office, and was not otherwise advised as to her right to trial.

6. Petitioner was permitted by F. B. I. agent Colard to believe there was some truth in a report that unless she pleaded guilty her husband would be implicated in the case.

7. Petitioner was not apprised of the consequences of waiving counsel and pleading guilty to a charge carrying a maximum penalty of death.

8. Petitioner misunderstood and was not advised of the purport and meaning of the "waiver" she signed.

9. At the time she pleaded guilty petitioner was ignorant of the rules governing the burden of proof and the presumption of innocence in criminal trials.

10. The "waiver" petitioner signed is partially indecipherable and according to its terms waives counsel "at the trial of this cause."

* * * * *

The following quotation from *Smith v. O'Grady, supra*, is believed to be peculiarly applicable here:

"The circumstances under which petitioner asserts he was entrapped and imprisoned in the penitentiary are wholly irreconcilable with the constitutional safeguards of due process. For his petition presents a picture of a defendant, without counsel, bewildered by court processes strange and unfamiliar to him, and inveigled by false statements of state law enforcement officers into entering a plea of guilty."

Likewise the following from *Williams v. Kaiser, supra*:

"He needs the aid of counsel lest he be the victim of overzealous prosecutors, or the law's complexity, or of his own ignorance or bewilderment."

CONCLUSION

In consideration of the foregoing, petitioner respectfully prays that the judgment of the Circuit Court of Appeals for the Sixth Circuit herein may be reversed.

Respectfully submitted,

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October 13, 1947.

FILE COPY

No. 1285

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In the Supreme Court of the United States

OCTOBER TERM, 1946

MARIANNA VON MOLTKE, PETITIONER

v.

A. BLAKE GILLIES, SUPERINTENDENT OF THE
DETROIT HOUSE OF CORRECTION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH
CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the district court (R. 170-174) is not reported. The majority and dissenting opinions in the circuit court of appeals (R. 182-198) have not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered March 10, 1947 (R. 181). The petition for a writ of certiorari was filed April 24, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the evidence is sufficient to sustain the finding of the district court in the habeas corpus hearing that petitioner freely, intelligently, and knowingly waived her constitutional right to the assistance of counsel and pleaded guilty.

STATEMENT

On September 17, 1943 (see R. 17), an indictment was filed in the District Court for the Eastern District of Michigan charging that petitioner and others conspired to transmit to the German Reich materials and information relating to the national defense of the United States with the intent that they be used to the injury of the United States, and to collect and publish information in respect of the movement and disposition of the armed forces, ships, aircraft, and war materials of the United States with intent to communicate such information to the German Reich, in violation of Sections 2 and 4 of the Espionage Act of June 15, 1917, Title I, c. 30, 40 Stat. 217 (50 U. S. C. 32, 34). Forty-seven overt acts were alleged, of which five (Nos. 24, 29-32) concerned petitioner. Four of these five (Nos. 24, 30-32) charged that petitioner met and conferred with one or more of the other defendants on designated dates; the other (No. 29) charged that petitioner introduced one Arndt to another defendant. Each overt act was specifically alleged to have been committed "in pur-

suance of said conspiracy and to effect the object and purpose thereof." (R. 20-34.)

Petitioner was arraigned on September 21, 1943; on the advice of an attorney appointed by the court for the purposes of arraignment only, she stood mute, and a plea of not guilty was entered on her behalf (R. 10-12, 47, 110-113). On October 7, 1943, petitioner signed a waiver of her right to counsel (R. 36); withdrew her plea of not guilty, and entered a plea of guilty (R. 159-160).

On August 7, 1944, petitioner, through counsel, moved for leave to withdraw her plea of guilty on the grounds that it was made without knowledge of her legal rights and understanding of the nature of the offense charged, and that the acceptance of the plea by the court when she was without counsel violated her right to counsel under the Sixth Amendment (R. 37). Following a hearing,¹ the motion was denied by Judge Moinet, who found that petitioner was properly advised of her constitutional rights by the court both prior to and at the time she entered her plea of guilty, that the plea was submitted after due and careful deliberation, that petitioner was advised of and thoroughly understood the nature of the charge contained in the indictment, that the plea was not due to any promises or misrepre-

¹ The present record does not contain the proceedings at this hearing. It is stated in the petition for a writ of certiorari that no testimony was taken at the hearing (Pet. 12).

sentations, and that the motion for leave to withdraw the plea was not filed within the ten-day period prescribed by Rule 2 (4) of the Criminal Appeals Rules (18 U. S. C., following § 688), which were then in effect (R. 46-47).

On November 15, 1944, petitioner was convicted on her plea of guilty and sentenced to imprisonment for four years. (R. 8-9). So far as the record indicates, no appeal was taken.

On February 7, 1946, petitioner filed in the convicting court a petition for a writ of habeas corpus, alleging that her imprisonment was illegal in that she had been denied the assistance of counsel for her defense and had been coerced, intimidated, and deceived into pleading guilty, in violation of her constitutional rights (R. 1-7). The writ issued (R. 15-16) and a hearing was held (R. 47-170). The district court (Judge O'Brien) found not only that petitioner, "an intelligent, mentally acute woman" (R. 174), who was "obviously of good education and above the average in intelligence" and who had a "fluent and ample" knowledge of English (R. 171), had failed to sustain the allegations of the petition by a preponderance of the evidence, but that the overwhelming weight of the evidence showed that she had freely, intelligently, and knowingly waived her constitutional rights (R. 170-174). The writ was accordingly dismissed, and petitioner was remanded to the respondent's custody (R. 175). On appeal to the Circuit Court of

Appeals for the Sixth Circuit, the judgment of the district court was affirmed (R. 181), one judge dissenting (R. 189-198).

Petitioner testified at the hearing on the writ as follows: She was arrested on August 24, 1943, on a Presidential warrant as a dangerous enemy alien (R. 48, 50). She was living in Detroit at the time with her husband, an instructor in German at Wayne University, and two of her three children, one of whom was suffering from diabetes (R. 48, 59). At some time following her arrest, her husband was suspended from his \$4,000-per-annum teaching position and later got a job paying \$35 per week (R. 168). In addition to her household duties, petitioner was a member of the Red Cross and a local Parent-Teachers Association, engaged in social work at a Y. W. C. A. International Center, and participated in such voluntary work as gasoline and sugar rationing (R. 89-90). Following her arrest, she was questioned from August 24 to August 27 by two agents of the Federal Bureau of Investigation, both of whom were courteous and friendly to her (R. 49). On September 18, 1943, a copy of the indictment involved herein (see *supra*, p. 2) was handed to her; she read it, but did not understand it (R. 50). On September 21, 1943, she was taken before Judge Moinet to be arraigned; she was advised by the judge that she was entitled to counsel; she stated that she had no money, and the judge said he would appoint counsel for her. A lawyer who

was in the courtroom was appointed as her attorney for the purposes of arraignment only; the lawyer did not see the indictment, but merely asked her how she wished to plead, to which she replied, "Not guilty"; on the lawyer's advice, she stood mute when arraigned, and a plea of not guilty was entered for her.² The judge then told her that he "would appoint an attorney right away," from which she understood that "the gentleman was to be expected to come right away"; she was then taken to Wayne County Jail. (R. 51-53.)

Between September 23 and October 7, 1943, the date on which she pleaded guilty, petitioner further testified, agents Kirby, Dunham, Hanaway, and Collard of the F. B. I. came daily to the cell block where she and two female codefendants were incarcerated (R. 53). The agents and the three defendants would engage in "conversations and discussions" concerning "things of interest," such as "hostile publicity, and sentiment, and cost of the trial, and the inquisition of the Federal Judge" (R. 53-54). On one or more of these

² Archie Katcher, the attorney appointed by Judge Moinet to represent petitioner at her arraignment, testified that he talked to petitioner in a whispered conversation for a few minutes; that he asked her and a codefendant whom he was also representing, "both at once, whether they understood what this was all about"; that one of them said she did understand, and the other indicated that she too understood; that both indicated they felt they were not guilty; and that he advised them to stand mute when arraigned (R. 110-113).

occasions, petitioner asked Dunham, "Is it really so bad, that the public is so hostile?"; " * * * if we go to Court, will we be bodily attacked?"

Dunham would reply, "It is war time—you have to bear that in mind. Public sentiment grows from war hysteria. You don't need to be afraid; you will be protected." This left her with "the thought that it is terrible to go to court and face a hostile public." (R. 82-83.)³ On another such occasion, petitioner heard Kirby tell Mrs. Behrens, a codefendant who had pleaded guilty, that "the other defendants" in the case would plead guilty the following week; petitioner asked Kirby whether, if the other defendants pleaded guilty, she would "get a trial for myself;" Kirby replied that he "could not answer this question because he did not know if this would be all right with the prosecuting attorney" (R. 85).⁴

Petitioner also testified that on September 25, 1943, two attorneys conferred with her at the request of her husband for some two and one-half hours (R. 56, 92). One of the attorneys, Okrent, "inquired was I to have counsel," and she

³ Dunham denied that he ever advised or suggested to petitioner that "public feeling was running high" in connection with the case (R. 154).

⁴ Kirby testified that when petitioner asked him about her right to a trial in the event the other defendants pleaded guilty, he replied that "the question of the trial would be up to the United States Attorney's office," and might also have stated that he "knew of no reason why she should not be tried without the others" (R. 134-135).

replied that Judge Moinet was going to appoint counsel for her (R. 93). She talked only to Okrent; the other attorney, Berger, "was just sitting there" (R. 92). She at no time asked the attorneys anything about her case (R. 95); the discussion was exclusively concerned with her family affairs (R. 93).³

On or about September 27, 1943 (R. 56), petitioner further testified, she summoned agent Collard for the purpose of obtaining from him "some information as to the indictment. I didn't understand that." Up to that time she had received no advice concerning the indictment. She told Collard that "he has taken my statement and he knew that * * * I didn't do those

³ Berger testified that, though Okrent "did most of the talking," he also talked to petitioner (R. 114), and, it would appear, quite extensively. He interrogated petitioner as to the charges that had been made against her (R. 114); he would read to petitioner parts of the indictment referring to her, and put her through "a form of cross-examination" (R. 119); the purpose of the interview was to discuss "this case" with her, and not family matters primarily (R. 118); petitioner talked about her family affairs, such as how her husband "was getting along, and whether he would be reinstated," etc. (R. 117), but also talked "About this case, about the indictment, or the conspiracy under the Espionage Act. We wanted to know the whole story, and I presume she told us" (R. 115); the "question of pleading guilty came up" and Berger told her "if you are guilty, plead guilty; and if you are not, do not" (R. 120). The attorneys made it clear, however, that they were not acting as attorneys, but merely as friends of petitioner's husband (R. 116).

things which are called 'Over' Acts." (R. 54-55, 69.) Collard told her that the indictment did not "cover the charge" (R. 55), that it did not "mean much of anything" (R. 76); that "those charges don't mean a thing" (R. 77). He then explained the indictment to her "by an example which he called the 'Rum Runners,' " and which she understood as follows: " * * * if there is a group of people in a 'Rum' plan who violate the law, and another person is there and the person doesn't know the people who are planning the violation and doesn't know what is going on, but still * * * this plan is carried out, in the law the man who was present * * * nevertheless is guilty of conspiracy." She then told Collard, "If that is the law in the United States, I don't know how I ever can prove myself innocent, and how will any judge know how am I guilty if this is the law?" Collard then explained about the "Probation Department" and its functions. (R. 55.) Petitioner believed that Collard was qualified to explain the indictment to her because she knew he was a lawyer (R. 56).⁹

⁹Collard, an attorney who had practiced law (R. 140), testified that at petitioner's request, he spent several hours discussing the indictment with her (R. 139-140, 141); that he attempted to explain the nature of a conspiracy to the best of his ability (R. 142); that he could not recall petitioner's asking him to explain the meanings of "feloniously" and "overt act," but that if she did, he probably tried to explain them (R. 143-144); that he was unable to recall his use of any "rum runner" illustration, though he might have used

As a result, apparently, of something told her by Mrs. Behrens, the codefendant who pleaded guilty, petitioner began to fear; she further testified, that if she did not "fall in line and plead guilty," her husband would be implicated, as well as herself (R. 60-62). She asked Collard if that was true, and Collard said that "he couldn't answer that question" (R. 61). On September 28, 1943, she said to agent Hanaway, "As the matter stands, and as I understand the situation, I am supposed to plead guilty"; she told him she was "willing to cooperate," but wanted assurance from Assistant United States Attorney Babcock, who was handling the prosecution, of three things—that the publicity concerning the case would be stopped immediately, that she would be incarcerated, if at all, in an institution near Detroit, and that she would never be deported. Hanaway agreed to convey her message to Babcock. Later the same day, petitioner was taken to the marshal's office, where she conferred with Babcock. She told Babcock that she understood "the situation" and knew that he wanted her to plead guilty; that if she pleaded guilty, it was such an illustration (R. 142-143); that it was possible that petitioner asked him whether "merely conferring with people who later turned out to be guilty of criminal acts would also make her a criminal," but he could not recall such a question (R. 144).

Hanaway testified that he had no recollection of petitioner's ever having said that she was pleading guilty because she wanted to cooperate (R. 123, 124).

only "to cooperate," and not because she was guilty, which she was not. She then repeated her three "conditions" to Babcock. (R. 58-59.) Because, however, "the answer Mr. Babcock gave me was not fully satisfactory,"⁸ and because she was advised by her husband, in a conference with him at about the same time as her visit with Babcock, not to do anything without consulting a lawyer, petitioner decided not to plead guilty that day, and told Babcock that she wanted "to think the whole situation over" (R. 60, 103-104):

Notwithstanding her husband's advice, petitioner further testified, she did not consult a lawyer (R. 65). After further reflection, she finally made up her mind to plead guilty even though she knew she was innocent (R. 64). Accordingly, on October 7, 1943, she talked to Babcock again and told him she was ready to plead guilty. She repeated to him that her plea would be made notwithstanding her knowledge of inno-

⁸ Babcock testified that petitioner at no time stated to him that she wished to plead guilty in order to cooperate, or that she wanted to plead guilty even though she was not guilty (R. 159):

⁹ Babcock testified that he made it very clear to petitioner that he had no control over the publicity connected with the case, her place of incarceration if she pleaded guilty, or the matter of her possible deportation, and could therefore give her no assurance whatever in respect of the three "conditions" she sought to attach to her proffered plea of guilty (R. 158-159, 163-164). Hanaway also testified that Babcock made this clear to petitioner (R. 123, 124-125).

cence.¹⁰ Babcock accordingly took her before Judge Lederle because Judge Moinet was not in court that day. (R. 65.) Judge Lederle asked her if the indictment had been explained to her, and she replied in the affirmative, though it had not been (R. 67-68). According to her testimony, he also asked her if she was pleading guilty because she felt she was guilty, and she said, "Yes," though this was not true (R. 68). A "note" was handed to her to sign; at first she objected to signing it because it mentioned something about a trial, which she did not want; Babcock told her it was all right to sign it, however, so she did (R. 66-67).¹¹ Judge Lederle then accepted her plea of guilty (R. 72). In a conversation with agents Dunham and Kirby shortly after pleading guilty,

¹⁰ Babcock specifically contradicted this testimony of petitioner (see note 8, *supra*, p. 11). Collard, who was present at this second interview between Babcock and petitioner, testified that he was "absolutely positive" that petitioner did not state, either to Babcock or to himself, that she wanted to plead guilty even though she was not guilty, or in order to cooperate with the Government, but, on the contrary, that she stated she wanted to plead guilty because she was guilty (R. 138).

¹¹ This "note" was a formal waiver of her right to counsel (see R. 36). Babcock testified that Judge Lederle "was extremely careful and meticulous to make sure, as he always does, that [petitioner] understood what she was doing." He further testified that the judge "interrogated her as to whether she wished to have counsel represent her and advised her as to signing a waiver of that right. * * * I wish to say again that I have no distinct recollection now—let me put it this way: if any of our Judges have missed doing that, I would have remembered that very distinctly." (R. 166.)

petitioner told them "even then" that she "should not have pled guilty"; that she "had done the wrong thing in pleading guilty" because she was not guilty (R. 72-73).¹²

"Around Christmas," 1943, petitioner further testified, she learned that it was permissible for a defendant to withdraw a plea of guilty (R. 73).¹³ Shortly after Christmas, she learned for the first time from Okrent, one of the attorneys who visited her in jail (*supra*, pp. 7-8), and who eventually represented her in her motion to withdraw her plea of guilty (see R. 37), of a defendant's presumption of innocence and of the fact that, contrary to her prior understanding, a defendant who pleads guilty may not appeal his case (R. 73).

On cross-examination, petitioner testified that after having read the indictment, she definitely felt that she was innocent of the charges contained in it, though she did not know what those charges were (R. 90-91). She admitted that she repeatedly asked the F. B. I. agents for advice as to how to plead, because "There was nobody else I could ask." She denied that the agents ever told her to consult her attorney.¹⁴ She denied that she

¹² Kirby contradicted this testimony of petitioner (R. 133). Dunham was not questioned concerning this alleged statement of petitioner.

¹³ Petitioner's motion for leave to withdraw her plea of guilty was filed August 7, 1944 (*supra*, p. 3).

¹⁴ Dunham (R. 147, 153), Hanaway (R. 128-129), and Kirby (R. 131-132) all testified that they advised petitioner to consult counsel about her case.

ever told the agents that she did not want an attorney.¹⁵ She denied that she ever told the agents that she did not want the attorney her husband had sent. (R. 96.)¹⁶ She denied that she ever told the agents that she had had arguments with her husband regarding the matter of retaining an attorney (R. 98).¹⁷ She denied that Babcock ever told her that she should not plead guilty in reliance on any of the three "conditions" she had expressed to him.¹⁸ Asked if she did not know, from the fact that her husband told her she should not plead guilty before consulting an attorney, that she was entitled to a lawyer before pleading

¹⁵ Kirby testified that when he told petitioner she should consult an attorney, she "jerked her shoulders, and said she was not interested; that she wanted to make up her own mind" (R. 132). Collard testified that on more than one occasion petitioner told him she did not want an attorney (R. 137). Dunham testified that petitioner told him that her husband "was very determined she should have an attorney," but that she felt that the problem of whether to plead guilty or not "was a problem she wanted to decide herself" (R. 148; see also R. 153).

¹⁶ Dunham contradicted this testimony of petitioner (R. 148, 153).

¹⁷ Dunham testified that petitioner told him that her visits with her husband were "unpleasant" because he kept insisting she retain counsel (R. 148).

¹⁸ Babcock testified that he told petitioner that under no circumstances should she plead guilty in reliance on anything he might say concerning the conditions on which she wished to plead guilty, and that she would have to make her decision with respect to her plea "on the basis of whether or not in her own conscience she had to say that she was guilty" (R. 159).

guilty if she wished one, she replied that she did not (R. 103). She denied knowing that she did not have to plead guilty if she did not want to (R. 103, 105-106). She admitted that, after her husband persuaded her, on the occasion of her visit with Babcock, not to plead guilty before seeing a lawyer, she thereafter made the decision to "disregard the advice that your husband had given you" and "plead guilty instead" (R. 103-104). She maintained that she told Babcock that she wished to plead guilty "Though I know I am not guilty," but only "To cooperate, to fall in line, to get it over with,"¹⁹ though she admitted that no one had requested her to do that (R. 105).

All four of the F.B.I. agents concerned testified, on behalf of the respondent, that they made no promises of any kind to induce petitioner to plead guilty (R. 121, 131, 136, 147), and never advised her to plead guilty (R. 122, 124, 131, 137, 147, 151, 153). All testified that petitioner kept trying to induce them to advise her whether to plead guilty or not, but they told her that that was a matter for her or her attorney to decide (R. 121, 128-129, 131-132, 135, 137, 140, 148, 152, 153). Hanaway testified that he told petitioner that, "if she felt that she were innocent in her heart she should under no circumstances plead guilty" (R. 122).

¹⁹ See note 8, *supra*, p. 11.

Collard testified that at the time he acceded to petitioner's request that he explain the indictment to her she had a copy of the indictment, had read it, and had the paragraphs pertaining to her circled or otherwise marked (R. 140, 142). He further testified that he believed that petitioner's plea of guilty was made "after due consideration with a full and complete understanding of the charge made against her" (R. 146; see also R. 147).

Babcock testified that he cautioned petitioner that her decision whether to plead guilty or not should depend solely on her feeling of guilt or innocence; that he would never have taken her to court to enter a plea of guilty if she had told him she wished to plead guilty notwithstanding her innocence; that Judge Lederle accepted her plea of guilty only after proceeding "in the normal way"; that the "normal way" was for the judge to ask the defendant if it was true that he wished to plead guilty, if the plea was being tendered by reason of any promises or threats made to him, if the plea was being made because the defendant was guilty, and if the defendant had counsel or desired appointed counsel; and that only upon his receiving satisfactory answers to these questions would the judge accept a plea of guilty (R. 159-160). Other pertinent testimony by Babcock and the F. B. I. agents is set out in footnotes 3-4, 6-12, 14-18, *supra*.

ARGUMENT

The only issue in this case is whether the district judge was warranted in finding (R. 174) that petitioner freely, intelligently, and knowingly waived her constitutional rights to the assistance of counsel and, by her plea of guilty, to a trial by jury. Whether or not petitioner did so waive her rights presented purely a question of credibility of witnesses, which the district judge resolved against petitioner. We submit that he was clearly correct in doing so.

(a) *Whether petitioner intelligently waived her right to counsel.*—Petitioner maintained at the hearing below that she was unaware of her right to counsel (*supra*, pp. 14–15), which the record of the convicting court shows she intelligently waived (R. 36). We submit, however, that from the evidence adduced, including petitioner's own admissions, her statement in this respect is inherently incredible. Nothing in the dissenting opinion below, moreover, suggests that petitioner may have been unaware of this right. The evidence we have summarized in the Statement, *supra*, clearly established that petitioner, an intelligent, mentally acute woman of good education, who had led a fairly active social life, was fully cognizant of her right to be represented by counsel. She was advised of that right by the court on the occasion of her original arraignment, and an attorney was in fact appointed to represent her and did repre-

sent her, though for the purposes of the arraignment only. By her own admission, she was told by the court that another lawyer would be appointed to represent her in subsequent proceedings. While no other attorney ever did represent her, this was because she thereafter decided she did not desire counsel and she so advised the court when, two weeks after her original arraignment and entry of a plea of not guilty, she formally waived her right to counsel and changed her plea to guilty. Between the time of her original arraignment and her change of plea, her husband made every effort to induce her to retain counsel. He even sent two attorneys to visit her and talk to her about the case. While they told her they were there as friends of her husband and not as attorneys, she herself admitted that they asked her whether she planned to retain counsel and that she explained to them that counsel was to be appointed for her. The F. B. I. agents on numerous occasions likewise advised her to engage counsel. Notwithstanding her testimony that she was waiting for the lawyer whom the court promised to appoint for her (see R. 103), however, her statements and conduct clearly indicated that she not only was not anxious for the promised attorney to come, but that she forcefully repudiated the idea of counsel both to her husband and to the F. B. I. agents. She even became incensed at her husband's insistent attitude on the matter. The evidence showed that

the only decision she was having difficulty in making was whether to plead guilty or not; and on this she wanted to make up her own mind. The only considerations which she deemed important in making this decision were her chances, if she pleaded guilty, of never being deported, of being incarcerated in an institution close to her home in the event she was sentenced to imprisonment, and of securing an end to the unfavorable publicity which had attached to the case and which was adversely affecting her husband's employment and standing in the community. She sought to secure some sort of guarantee from the prosecuting attorney that these three "conditions" would be fulfilled if she pleaded guilty, but he, of course, could not and did not make any such guarantee. Nevertheless, she decided after further deliberation to plead guilty anyway, and to take her chances on the realization of her desires in the matter. She then announced her decision to the prosecuting attorney, who satisfied himself that she wished to plead guilty because she felt that she was guilty. The prosecuting attorney then brought her before Judge Lederle to effect the change of plea. The judge accepted her plea of guilty only after satisfying himself by careful questioning that the plea was not the result of threats or promises but of a sense of guilt, and that, with knowledge of her right to counsel, petitioner voluntarily waived that right.

Petitioner's testimony (*supra*, p. 13) that she was not aware, when she pleaded guilty of the presumption of innocence enjoyed by defendants in American courts and did not learn of it until two or three months thereafter is, we submit, without special significance in this case. Advice regarding this presumption is but one of the many kinds of advice a lawyer may be expected to give his client, and the evidence overwhelmingly established that petitioner freely and intelligently waived her right to counsel. The right of the Government and the courts to rely on a free and intelligent waiver of the right to counsel would obviously be illusory if every defendant who made such a waiver and was thereafter convicted, whether on a plea of guilty or otherwise, could then revoke his waiver and secure a new trial on the ground that he would have adopted different tactics if he had known something that an attorney might have told him. See *Adams v. United States ex rel. McCann*, 317 U. S. 269, 275-281. It is not without significance, moreover, that, even according to her own testimony, some eight months elapsed between the time petitioner learned of the presumption of innocence and of the possibility of withdrawing a plea of guilty, and her filing of the motion for leave to withdraw her plea (see pp. 3, 13, *supra*).

(b) *Whether petitioner intelligently pleaded guilty.*—The dissenting judge below did not ques-

tion that petitioner, with knowledge of her right to counsel, freely waived the right. Rather, the sole basis of his dissent was his belief that the record established that an agent of the F. B. I., in all honesty, but erroneously, advised petitioner that she was guilty of conspiracy if she merely conferred with people who later turned out to be criminals, that in reliance on the truth of this advice petitioner felt her case was hopeless, and that, believing that the retention of counsel would be superfluous under the circumstances, she decided to plead guilty without the advice of counsel (see R. 197). It was only because he believed the record established the giving of this misleading advice that he felt petitioner "did not competently and intelligently waive her right to counsel" and did not intelligently plead guilty (*ibid.*). The only evidence in the record, however, that an F. B. I. agent gave petitioner this erroneous advice is her own statement to that effect, which the district judge certainly was not required to, and evidently did not, believe. Petitioner gained her erroneous impression of what was required to make one a conspirator, she testified, from the agent's explanation of the indictment by the use of a hypothetical illustration involving "rum runners," in which an innocent person who associated with criminal conspirators became himself a criminal conspirator. Collard, the agent involved, did not admit that he ever misinformed

petitioner, however. In fact, he testified that he had no recollection of ever having used an illustration of conspiracy involving "rum runners," much less that he ever attempted to explain a conspiracy by any illustration in which one of the "conspirators" lacked the essential requirement of criminal intent. He admitted the possibility that he might have used an illustration involving "rum runners," but he certainly did not admit, as the dissenting judge seems to have assumed (see R. 194), that he might have given any such illustration in the manner attributed to him by petitioner—that is, in such a way as to indicate guilt of conspiracy by one innocent of all criminal intent. He testified that he attempted, at petitioner's behest, to explain to her the meaning of conspiracy to the best of his ability. He further restated his belief, expressed earlier in an affidavit opposing petitioner's motion to withdraw her plea of guilty (see R. 144-145), that petitioner's plea was her free and voluntary act made after due consideration "with a full and complete understanding of the charge made against her in the indictment in the instant case" (R. 146-147). Such a statement would have been entirely inconsistent with any admission on his part that he gave petitioner misleading information. It strains credulity to believe that an F. B. I. agent, a qualified attorney who had practiced law, could

himself believe, and honestly²⁰ advise another, that a person could be guilty of a criminal conspiracy which was punishable by death (see 50 U. S. C. 32, 34) without any criminal intent or even knowledge of the existence of the conspiracy. It is even more incredible that he should have stated, as petitioner testified he stated (*supra*, p. 9), that the indictment which charged so serious a crime did not "mean much of anything," that "those charges don't mean a thing." The district judge, who heard and observed the witnesses, evidently did not believe that the agent had so misinformed petitioner, or at least that petitioner was misinformed, since he specifically found that she "understood the charge and the proceedings" (R. 174). And, we submit, he was amply warranted in refusing to believe petitioner's testimony that she was misled by misinformation as to the charge given her by the agent. As we have indicated in the Statement, *supra*, petitioner's testimony at the hearing was replete with self-serving statements which, in numerous particulars, were contradicted by Babcock, the F. B. I. agents, and Berger; and which, in other instances, were intrinsically incredible (see, particularly, petitioner's testimony on cross-examination, *supra*, pp. 13-15).

²⁰ There is no suggestion whatever that the explanation given by Collard to petitioner was not given with utter honesty and to the best of his ability. See the comments of the dissenting judge below at R. 194, 196, 197.

It is noteworthy, moreover, that petitioner's theory at the hearing was not that she had innocently done the acts of meeting and conferring (overt acts 24 (R. 29), 30-32 (R. 30-31)) and making an introduction (overt act 29 (R. 30)), but that she had not done the acts at all (see pp. 8-9, *supra*; see also R. 50, 64-65, 76-77). In view of this denial, it is utterly inconsistent to say, as she does, that she was misled into pleading guilty by a belief erroneously imparted to her by Collard that mere association with criminals makes oneself a criminal. Furthermore, petitioner admittedly read the entire indictment (*supra*, pp. 5, 13), and there was evidence that she had marked the paragraphs concerning her (*supra*, p. 16). It is difficult to believe that a "mentally acute" woman, "obviously of good education and above the average in intelligence," and having a "fluent and ample" command of English (R. 171, 174; see also R. 183), could read the overt acts without observing and perceiving some significance in the qualifying words repeated in each—"in pursuance of said conspiracy and to effect the object thereof." The nature of the conspiracy thus referred to was set forth in detail in the first part of the indictment, which, of course, also mentioned petitioner by name. It would take very little knowledge of English indeed to read and understand, at least generally, the nature of the charge and its gravity.

The record of the convicting court shows that petitioner, having been advised of her right to counsel, voluntarily and intelligently waived her right and pleaded guilty. The presumption of regularity which attaches to a judicial judgment is not lightly to be rebutted on collateral attack. *Johnson v. Zerbst*, 304 U. S. 458, 468-469. Petitioner had a full and fair hearing of her contention that she did not knowingly and intelligently waive counsel and plead guilty. The issue presented to the district judge was fundamentally one of accepting or rejecting petitioner's testimony in respect of whether she knew of her right to counsel when she waived it and of the nature of the charge to which she pleaded guilty. The district judge, who observed petitioner's demeanor, rejected her testimony in these respects. We submit that he was clearly justified in so doing, as the record establishes, if the government witnesses were entitled to any credence at all, that petitioner was not above misstating the facts whenever it was to her advantage to do so.²¹

²¹ While the doctrine of *res judicata* does not, properly speaking, apply in a habeas corpus proceeding (*Salinger v. Loisel*, 265 U. S. 224, 230), and the district judge below based his findings solely on the evidence adduced at the habeas corpus hearing, it may be observed that another judge of the same court made substantially the same findings in denying petitioner's motion for leave to withdraw her plea of guilty based on the same contention (*supra*, pp. 3-4), and that no appeal was taken from the order of denial or the judgment of conviction.

CONCLUSION

The judgment below is correct, and turns on the credibility of witnesses heard by the trial judge. There is no conflict of decisions. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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Acting Solicitor General.

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MAY 1947.

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No. 73

In the Supreme Court of the United States

OCTOBER TERM, 1947

MARIANNA VON MOLTKE, PETITIONER

v.

A. BLAKE GILLIES, SUPERINTENDENT OF THE
DETROIT HOUSE OF CORRECTION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

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OPINIONS BELOW

The opinion of the district court (R. 170-174) is not reported. The majority and dissenting opinions in the circuit court of appeals (R. 182-198) are reported at 161 F. 2d 113.

JURISDICTION

The judgment of the circuit court of appeals was entered March 10, 1947 (R. 181). The petition for a writ of certiorari was filed April 24, 1947, and granted June 2, 1947 (R. 199). The jurisdiction of this Court rests upon Section

240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the district court was warranted in finding from the evidence adduced at the habeas corpus hearing that petitioner failed to sustain her burden of proving that she did not freely, intelligently, and knowingly waive her right to the assistance of counsel, and that she did not freely, intelligently, and knowingly plead guilty.

STATEMENT.

On September 17, 1943 (see R. 17), an indictment was filed in the District Court for the Eastern District of Michigan charging that petitioner and others conspired to transmit to the German Reich materials and information relating to the national defense of the United States with the intent that they be used to the injury of the United States, and to collect and publish information in respect of the movement and disposition of the armed forces, ships, aircraft, and war materials of the United States with intent to communicate such information to the German Reich, in violation of Sections 2 and 4 of the Espionage Act of June 15, 1917, Title I, c. 30, 40 Stat. 217 (50 U. S. C. 32, 34). Forty-seven overt acts were alleged, of which five (Nos. 24, 29-32) concerned petitioner. Four of these five (Nos. 24, 30-32) charged that petitioner met and conferred with

one or more of the other defendants on designated dates; the other (No. 29) charged that petitioner introduced one Arndt to another defendant. Each overt act was specifically alleged to have been committed "in pursuance of said conspiracy and to effect the object and purpose thereof." (R. 20-34.)

Petitioner was arraigned on September 21, 1943; on the advice of an attorney appointed by the court for the purposes of arraignment only, she stood mute, and a plea of not guilty was entered on her behalf (R. 10-12, 47, 110-113). On October 7, 1943, petitioner signed a waiver of her right to counsel (R. 36), withdrew her plea of not guilty, and entered a plea of guilty (R. 35).

On August 7, 1944, petitioner, through counsel, filed a motion for leave to withdraw her plea of guilty and enter a plea of not guilty on the grounds that she was not guilty of the crime charged, that her plea of guilty was made "under circumstances of extreme emotional stress and during a time of extreme mental disturbance, without knowledge of her legal rights and without a thorough understanding of the nature of the offense charged," and that the acceptance by the court of her plea of guilty when she was without counsel violated her right to counsel under the Sixth Amendment (R. 37). Petitioner also filed an affidavit in support of this motion (R. 38-45).

Following a hearing,¹ the motion was denied by Judge Moinet, who found that petitioner was properly advised of her constitutional rights by the court both prior to and at the time she entered her plea of guilty, that the plea was submitted after due and careful deliberation, that petitioner was advised of and thoroughly understood the nature of the charge contained in the indictment, that the plea was not due to any promises or misrepresentations, and that the motion for leave to withdraw the plea was not filed within the ten-day period prescribed by Rule 2 (4) of the Criminal Appeals Rules (18 U. S. C., following § 688), which were then in effect (R. 46-47).

On November 15, 1944, petitioner was convicted on her plea of guilty and sentenced to imprisonment for four years (R. 8-9). No appeal was taken.

Fifteen months later, on February 7, 1946, petitioner filed in the convicting court a petition for a writ of habeas corpus, alleging that her imprisonment was illegal in that she had been denied the assistance of counsel for her defense and had been coerced, intimidated, and deceived into pleading guilty, in violation of her constitutional rights (R. 1-7). The writ issued (R. 15-16) and a hearing was held at which the following testimony was adduced:

¹ The present record does not contain the proceedings at this hearing. It is stated in petitioner's brief that no testimony was taken at the hearing (Br. 11). But the judge considered the affidavits on each side (cf. R. 149, 156, 146).

A. *The undisputed evidence.*—Petitioner was the wife of an instructor of German at Wayne University and has lived in the United States since the end of 1926 (R. 2, 48, 70). In addition to her household duties she was a member of the Red Cross and the local Parent-Teachers Association, engaged in social work at the Y. W. C. A. International Center, and participated in such voluntary work as gasoline and sugar rationing (R. 89-90).

On August 24, 1943, she was arrested on a presidential warrant as a dangerous enemy alien and detained at an Immigration Detention Home (R. 48-50, 126). From August 24 to August 27 she was questioned by two agents of the Federal Bureau of Investigation, Collard and Hanaway (R. 49, 95, 121, 126-127, 143), and she gave them a signed statement (R. 55, 143). She was not thereafter questioned about the case (R. 95, 143). Both of the agents were courteous and friendly (R. 49).

On September 18, 1943, a copy of the indictment involved in the present proceeding was handed to petitioner, and she read it (R. 50). On September 21 she and another woman defendant were brought before Judge Moinet for arraignment. The judge informed them that they were entitled to counsel, and when they said they had no money for counsel, he stated that he would appoint counsel for them (R. 51). The court

designated an attorney in the court room to represent them, but, when the attorney stated that he did not wish to be in the case, the judge appointed him for the purpose of arraignment only (R. 51, 110-111). The attorney engaged in a whispered conversation with the women and advised them that it would be to their advantage to stand mute rather than plead not guilty (R. 51-52, 111-112). On his advice, they stood mute and the court entered a plea of not guilty in their behalf (R. 52-53, 112).

Petitioner was then taken to the Wayne County jail (R. 53). Two other women named as defendants in the indictment occupied the same cell block (R. 53). Two other agents of the F. B. I., Kirby and Dunham, came regularly to the cell block to interrogate one of the other women, Mrs. Behrens, and Hanaway also came there occasionally. Petitioner frequently engaged in conversation with these agents. (R. 53-54, 122, 134, 147.)

On September 25, Okrent, an attorney who had been a pupil of petitioner's husband, and Okrent's partner, Berger, called on petitioner. They told her they had come at her husband's request and would let her husband know whether they would take the case. They conversed with petitioner for about 2½ hours. (R. 56-57, 91-93, 114-118.)

Either on September 27 or October 2, petitioner asked Collard, one of the F. B. I. agents who had taken her statement, to call on her, and Collard did so (R. 54, 56, 140). She questioned him about

the indictment and he attempted to explain it to her (R. 55, 75, 140).

On September 28 petitioner, on her own initiative, told Hanaway, another F. B. I. agent, that she would plead guilty if she would receive assurances that there would be no more publicity, that she would not be sent far away from Detroit, and that she would not be deported (R. 58, 99-100, 122). Hanaway said that he would relay her message to the Assistant United States Attorney, Babcock, who was in charge of the case (R. 58, 100, 123). Petitioner saw Babcock on September 28 in the Marshal's office and repeated those conditions to him (R. 58, 101, 124, 158-159). Babcock stated that he had no control over the matters presented by petitioner but that he would recommend that she be incarcerated near Detroit (R. 58-59, 101, 159). Babcock told her that the question whether to plead guilty or not rested with herself alone and that he was not permitted to influence her (R. 101, 159). She told Babcock that she was not ready to plead guilty that day (R. 60, 125). At her request she had conferred with her husband in the marshal's office, and her husband had asked her not to do anything before she saw a lawyer (R. 60, 103, 148).²

² After first denying that her husband had received any education in law, petitioner admitted that he had received "a certain amount of education in German law before the first World War" (R. 97).

On October 7, petitioner decided to plead guilty (R. 63, 65). She was brought before Judge Lederle (R. 65, 138-139). The judge at first demurred at accepting her plea because there had been an appearance of counsel in the case, but according to petitioner Babcock assured him that he could accept the plea (R. 66). Petitioner then signed a written waiver of counsel (R. 66-67) reading as follows (R. 36):

"I, Marianna von Moltke, being the defendant in the above entitled cause, having been advised by the Court of my right to be represented by counsel, and having been asked by the Court whether I desire counsel to be assigned by the Court, do hereby, in open court, voluntarily waive and relinquish my right to be represented by counsel at the trial of this cause.

The judge asked her whether the indictment had been explained to her and she said "Yes" (R. 67-68, 107, 139). The judge asked her whether she was pleading guilty because she felt she was guilty and she replied in the affirmative (R. 68, 107-108, 139).

Petitioner admitted that the agents never threatened her or made promises to her to induce her plea of guilty (R. 99) and the agents testified that they made no threats or promises of any kind to induce her to plead guilty (R. 121, 131, 133, 136, 147).

B. *The conflicting testimony.*—The circumstances surrounding the succession of events set forth above were the subject of sharply conflicting testimony.

1. *Petitioner's understanding of the indictment*

Petitioner testified that she read the indictment when it was handed to her but did not understand it (R. 50).

The attorney who represented her at the time of arraignment testified that he talked to petitioner and the other defendant for a few minutes, that he asked them both "whether they understood what this was all about." One of the women said "yes, they did understand, and the other indicated that she, too, understood" (R. 111).

On cross-examination of petitioner the following occurred (R. 90-91):

Q. Mrs. von Moltke, when you were served with the indictment in this case, did you read it?

A. I read it.

Q. And after you had read the indictment, did you feel you were innocent of the charges that were stated in the indictment?

A. Yes, sir, definitely so.

Q. You did not feel you were guilty of those charges that you read in the indictment?

A. I did not feel guilty of those charges in the indictment.

Q. Then you knew what the charges were in the indictment.

A. Oh, no, and so far I might explain that to you, I knew——

Q. Just answer my question.

The COURT. Answer the question.

A. Yes, I knew, not what the charges were, but I knew as I said before that I say I was accused of something of which I was not guilty. That was how I understood that.

Q. Well, you read the indictment. Isn't that right?

A. I read the indictment.

Q. And you felt you were innocent of the charges that were described in the indictment?

A. And the overt acts.

Q. And the overt acts?

A. Yes.

2. *The visit of attorneys Okrent and Berger*

Petitioner testified that when Okrent and Berger called on her on September 25 at her husband's request, she discussed only family affairs with them, that she talked only to Okrent, and that Berger "was just sitting there" (R. 92-95). She said that Okrent asked her if she was to have counsel and that she replied that Judge Moinet was going to appoint counsel for her (R. 93).

Berger took the stand on petitioner's behalf. He testified that he and Okrent, an associate in

his law firm, went to see petitioner at the request of her husband (R. 114). While Okrent "did most of the talking," Berger also talked to petitioner (R. 114). He interrogated petitioner as to the charges that had been made against her (R. 114), and examined her insofar as the indictment affected her (R. 119). He would read to petitioner parts of the indictment referring to her, and put her through "a form of cross-examination" (R. 119). The purpose of the interview was to discuss "this case" with her, and not family matters primarily (R. 118). Petitioner talked about her family affairs, such as how her husband "was getting along, and whether he would be reinstated," etc. (R. 117), but also talked "About this case, about the indictment, or the conspiracy under the Espionage Act. We wanted to know the whole story, and I presume she told us" (R. 115). The discussion "was all around the case, and the incidental phases of the case" (R. 119). The "question of pleading guilty came up" and Berger told her "if you are guilty, plead guilty; and if you are not, do not" (R. 120). The attorneys made it clear, however, that they were not acting as attorneys, but merely as friends of petitioner's husband (R. 116).

3. The discussions with the F. B. I. agents

Petitioner testified that between September 23 and the time of her plea of guilty the F. B. I. agents visited her cell block daily, and that after ques-

tioning Mrs. Behrens, a codefendant, they would engage in conversations with the women concerning "things of interest" such as the "hostile publicity, and sentiment, and cost of the trial, and the inquisition of the Federal Judge, and the—oh things which were in the interest of the trial, and our present state" (R. 53-54). On one of these occasions, petitioner testified, she asked Dunham, "Is it really so bad, that the public is so hostile?"; "* * * if we go to Court, will we be bodily attacked?" Dunham replied "It is war time—you have to bear that in mind. Public sentiment grows from war hysteria. You don't need to be afraid; you will be protected." This left her with "the thought that it is terrible to go to court and face a hostile public." (R. 82-83). On another such occasion, petitioner said, she heard Kirby tell Mrs. Behrens, who had pleaded guilty, that "the other defendants" in the case would plead guilty the following week; petitioner asked Kirby whether, if the other defendants pleaded guilty, she would "get a trial for myself"; Kirby replied that he "could not answer this question because he did not know if this would be all right with the prosecuting attorney" (R. 85).

Dunham, Kirby and Hanaway testified that they did engage in conversation with the three women defendants (R. 122, 134, 147). Hanaway testified that he was present in petitioner's cell block on only a few occasions and that at such times there was "general discussion among the

three ladies" which "centered about whether they were going to plead guilty, or they were going to trial, or what was going to happen." "They were all trying to make up their minds." Hana-way told petitioner that "if she felt that she were innocent in her heart she should under no circumstances plead guilty." (R. 122.) On one occasion petitioner asked him to explain the indictment to her, and he refused, saying, "Mrs. von Moltke, I am not a criminal attorney, and I do not want to attempt to explain this indictment to you." He further told her that "she should either have her attorney, or the United States Attorney explain it to her." (R. 121, 129.)

Dunham testified that petitioner kept "endeavoring to get advice or information from me, or opinions," but that he declined to advise her (R. 151). She avidly read newspaper items concerning her case and "made many insinuations" on the basis of them (R. 151-152). She asked him "what her chances were in case she went to trial," and he told her he could not answer. She "went so far as to ask me if I could cite a similar case and advise her what the outcome was and I told her I could not." (R. 152.) She asked him if he knew whether Dr. Thomas, a co-defendant, would plead guilty or not, and he told her he did not know. He finally "came out and told her she should discuss this with an attorney." (R. 153.)

On one occasion, Dunham testified, petitioner inquired of him as to the nature of the charge against her, and he told her that he "couldn't explain the indictment to her or talk to her about it," and that he "would advise her to discuss the matter with an attorney" (R. 147). Dunham testified that he never advised or suggested to petitioner that public feeling was running high in connection with the cases in which she was involved (R. 154).

Kirby testified that when petitioner asked him whether she would have the right to a trial if the other defendants pleaded guilty he told her that "the question of the trial would be up to the United States Attorney's Office," and that he might have told her that he "knew of no reason why she should not be tried without the others" (R. 134-135).

4. Collard's advice

In regard to her conference with Agent Collard, petitioner testified that about September 27, she asked to see him because she wanted "some information as to the indictment. I didn't understand that" (R. 55, 56). She said she believed Collard was qualified to explain the indictment to her because she knew he was a lawyer (R. 56). She said she told Collard that he had taken her statement and knew that "I didn't do those things which are called 'Over' Acts." (R. 55.) Collard told her

that the indictment did not "cover the charge" (R. 55), that it did not "mean much of anything" (R. 76), that "those charges don't mean a thing" (R. 77). According to her testimony, he then explained the indictment to her "by an example which he called the 'Rum Runners,'" and which she understood as follows: "* * * if there is a group of people in a 'Rum' plan who violate the law, and another person is there and the person doesn't know the people who are planning the violation and doesn't know what is going on, but still * * * this plan is carried out, in the law the man who was present * * * nevertheless is guilty of conspiracy." She then told Collard, "If that is the law in the United States, I don't know how I ever can prove myself innocent, and how will any judge know how am I guilty if this is the law?" Collard, petitioner testified, then explained about the "Probation Department" and its functions. (R. 55.) At another point, petitioner testified that she told Collard that since he had taken her statement he knew that she was never in Grosse Pointe where one of the overt acts naming her was alleged to have occurred, and that she had "nothing to do with all the people named here" (R. 64-65, 75-76). It was after these statements, she testified, that he gave her the rum runners' illustration (R. 76).

Collard testified that on October 2 he received a message that petitioner wanted to talk to him.

When he visited petitioner she had a copy of the indictment that had circled the various "counts" that mentioned her (R. 140, 142). He talked with her for several hours and explained the nature of conspiracy to the best of his ability (R. 141-143). The following occurred on Collard's cross-examination (R. 142-144):

Q. And did you during that discussion use an illustration about a rum runner?

A. Well, I heard Mrs. von Moltke say that, and since she did I have been trying to recall, and I cannot remember such an illustration.

Q. I see.

A. But it is quite possible that Mrs. von Moltke's memory is better than mine, and I may have used such an illustration.

* * * * *

Q. (By Mr. FIELD): Did Mrs. von Moltke ask you the difference, or to define the difference between a combination, a conspiracy, and a confederation?

A. I am sure I don't know whether she asked me such a question or not.

Q. You don't recall that?

A. No, I don't believe I do.

Q. Did you discuss with Mrs. von Moltke whether she introduced one Edward Arndt to Grace Buchanan Deneen?

A. This is on the occasion of October 2?

Q. October 2, 1943.

A. I will have to answer that by saying that if that is one of the Overt acts in-

volving Mrs. von Moltke, then I did discuss it with her.

Q. And did you explain to Mrs. von Moltke the nature of an Overt act?

A. Well, if she asked me, I probably tried to, but whether she asked me or not I just don't remember.

Q. And did Mrs. von Moltke ask you whether merely conferring with people who later turned out to be guilty of criminal acts would also make her a criminal, and guilty of criminal acts?

A. I do not just recall that particular question. It is quite possible.

Collard testified that he did not indicate to petitioner the course she should pursue (R. 144). He testified that he told her that the question of whether she should plead guilty "was a matter strictly for her, and for nobody else" (R. 137). He reaffirmed the statement he had made in opposition to petitioner's motion to withdraw her plea that the plea was "her free and voluntary act made after due consideration with a full and complete understanding of the charge made against her in the indictment in the instant case" (R. 146). He said on the stand that "As far as I knew and could understand, she understood thoroughly what the whole thing was all about" (R. 147).

On cross-examination petitioner testified as follows (R. 91):

Q. Now, after you talked to Mr. Collard, did you still feel you were innocent of those charges?

A. Yes, sir, because I told Mr. Collard so.

Q. After Mr. Collard had explained the indictment to you, did you still feel you were innocent of the charges described in the indictment?

A. I told Mr. Collard so, and I could not go outside of the fact of the rum runners—

Q. Regardless of what Mr. Collard told you, you still felt you were innocent of the charges in the indictment?

A. Yes, sir.

In response to a question from the bench, petitioner admitted (R. 75) that no government official told her that she had to prove her innocence.

5. The September 28th conference with Assistant U. S. Attorney Babcock

Petitioner testified that on September 28, when she first said she was going to plead guilty, she told Hanaway, "As the matter stands, and as I understand the situation, I am supposed to plead guilty." She told him she was "willing to co-operate" but wanted her conditions met (R. 58). On cross-examination she admitted that she initiated the discussion of her plea of guilty (R. 99-101). She further testified that she told Babcock that she understood the situation and

knew that he wanted her to plead guilty, but that if she pleaded guilty it was only "to cooperate" and not because she was guilty (R. 58). She also testified that while Babcock gave her no guarantees, he told her he did not believe she would be deported and that they were "human" (R. 58-59, 102-103). She testified that she did not plead guilty on September 28 because "The answer Mr. Babcock gave me was not fully satisfactory" (R. 103), and because her husband, whom she had seen that day, asked her not to do anything without consulting a lawyer (R. 60, 103-104). She therefore told Babcock she wanted "to think the whole situation over" (R. 60).

Hanaway testified that he could not recall petitioner saying that she was pleading guilty because she wanted to cooperate (R. 123-124). All he recalled were the three conditions upon which she wished to predicate her plea (R. 123). He testified that he conveyed petitioner's conditions to Babcock, and that Babcock told him he had no control over those matters but that he would recommend that petitioner be sentenced to an institution near Detroit since her child was ill, emphasizing, however, that his recommendation would not be binding on the Bureau of Prisons (R. 123). Hanaway testified that he conveyed Babcock's message to petitioner (R. 123-124), and that subsequently Babcock repeated the same statements to petitioner in stronger form, pointing out that he did

not know how long he would be an Assistant United States Attorney (R. 124-125). Babcock made it very clear that petitioner's plea of guilty would have to be independent of any of the conditions which she expressed to him (R. 124, 125). Babcock also told petitioner she should not plead guilty unless she was guilty (R. 125).

Babcock testified that he told petitioner that he had no control over the newspapers, that he could do nothing about deportation, since that was a question for the Immigration and Naturalization Service to determine, and that, although he could not control the place of incarceration, he would recommend that she be imprisoned near Detroit where her family might see her (R. 159). He told her that "under any circumstances anything I might reply to her questions must not have any bearing whatsoever upon her decision to plead guilty or not plead guilty; that she would have to decide that for herself, on the basis of whether or not in her own conscience she had to say that she was guilty" (R. 158-159). He vigorously denied that petitioner had at any time told him she was pleading guilty in order to cooperate, or that she was pleading guilty even though she was not guilty (R. 159).

6. *The period between the September 28th conference and petitioner's plea on October 7th*

Petitioner testified that between September 28 and October 7, as a result of something said by

Mrs. Behrens, she began to fear that if she did not "fall in line and plead guilty" her husband would be implicated. She asked Collard if that was true and Collard said that he couldn't answer that question (R. 60-61).³ She further testified:

I asked Mr. Collard, "Do you think that in my statement I told the truth?" Mr. Collard said, "Mrs. von Moltke, I know—we know—you told the truth." And I asked Mr. Collard what does the FBI think—is my husband telling the truth? And he said, "Yes, we know that he is telling the truth." Later on I talked to Mr. Dunham, and he said they know my husband would tell the truth whether he hurts himself, or me, or anybody else. But as to this question, I felt that there was some proof in it.

Petitioner also testified that while the F. B. I. agents asked her whether she had seen an attorney (R. 84, 104), none of them ever told her that she should get advice from an attorney (R. 85, 96).

Kirby testified that when the subject of whether she should plead guilty or not came up on one occasion following her conference with Babcock

³ In her affidavit in support of her motion of August 7, 1944, for leave to withdraw her plea of guilty (see p. 3, *supra*), petitioner stated that "she asked Mr. Collard whether her husband was in any way involved in the matter, and that Mr. Collard replied to her that he was sorry but that he could give her no information concerning that fact, and that although at present she realizes that that was a perfectly proper and normal answer, at the time it was given to her, because of her state of mind, this was confirmation of the statement made to her by Mrs. Behrens" (R. 40-41).

on September 28, he told her that "that would be a question for her to decide, or her attorney, as we had understood from Mrs. von Moltke that Mr. von Moltke was interested in obtaining an attorney for her." At this suggestion, petitioner "jerked her shoulders, and said she was not interested; that she wanted to make up her own mind." (R. 131-132.) On another occasion petitioner inquired of Kirby whether a plea of guilty on her part would bar her husband from being reemployed. He replied that "that was a matter * * * between the University and himself, and the question of her plea was one that she had to decide, based upon her own feeling of guilt or innocence." (R. 135.)

Hanaway testified that on one occasion, when petitioner asked him to explain the indictment to her, he told her that she should have either her attorney or the United States Attorney explain it to her (R. 121, 129).

Collard testified that he told her she "could see an attorney at any time, that that was her privilege" (R. 140) and that she told him that she did not want an attorney (R. 137). He testified that "In all the conversations that I had with Mrs. von Moltke concerning the attorney, it was her idea that she did not want an attorney, and that she wanted to just go ahead without an attorney, and do whatever she was going to do without one" (R. 137).

Dunham testified that when petitioner questioned him about the indictment and about whether Dr. Thomas, a codefendant, would plead guilty he "finally came out and told her she should discuss this with an attorney" (R. 153). She told him that her husband was determined that she have an attorney but that she didn't want to discuss the matter with an attorney, that "it was a problem she wanted to decide herself." She said she didn't feel an attorney would be of much assistance to her "because her consideration was not only for herself, but for her husband and family" (R. 147-148). Petitioner said that her visits with her husband were unpleasant because he wanted her to have an attorney but she was determined to make up her own mind (R. 148).

On cross-examination petitioner was questioned about her decision not to plead guilty on September 28. The record reveals the following (R. 103-104):

Q. And your husband told you not to plead guilty?

A. He did.

Q. He told you to get a lawyer?

A. Yes; he said I should not before I have seen an attorney; on such a question I should talk to an attorney first about the whole thing.

Q. Then you knew at that time that you were entitled to a lawyer before you pled guilty, if you wanted one?

A. I did not. I just was wondering about the lawyer who never came.

Q. Well, you knew at that time, did you not, that you did not have to plead guilty if you did not want to? Yes or no?

A. No.

Q. Your husband told you to get a lawyer, didn't he?

A. My husband said to wait until a lawyer comes out.

Q. And you decided not to plead guilty because of that?

A. Because of that, yes.

Q. And you went back to the County Jail?

A. And the answer Mr. Babcock gave me was not fully satisfactory.

Q. At any rate, you decided not to plead guilty because of what your husband told you?

A. Yes.

Q. Did you see your husband about getting a lawyer before you pled guilty.

A. No, sir, I pled guilty, and my husband even did not know it.

7. The events of October 7th., when petitioner waived counsel and pleaded guilty

On October 7, petitioner decided to plead guilty (R. 63). She testified that Collard "came in just to see how I felt about it, and whether I had seen a lawyer, because I said I wouldn't decide before I had seen a lawyer" (R. 65). She told Col-

lard and Hanaway, who was with him, that she wished to "go with them to plead guilty." They asked her "whether I had seen my lawyer, and whether I had thought about what I was going to do." She stated that she replied, "I wish I would know whether that is the right thing, if I go and plead guilty." One of the agents—she could not remember which—then remarked, "At least it might be the wisest thing." (R. 63, 64.) She was then taken to Babcock and again told him she was ready to plead guilty. She testified that she repeated to him that her plea would be made even though she still felt she was not guilty (R. 65). Babcock accordingly took her before Judge Lederle because Judge Moinet was not in court that day (R. 65).

Petitioner testified as follows relative to the proceedings before Judge Lederle: "Mr. Babcock handed the judge what I would call a folder, and Judge Lederle looked into that and said he could not accept the change of plead because there was something about an attorney— * * * I understood that he said there was to be appointed an attorney in this case, or there was appointed an attorney in this case, or there was to be present an attorney—but I knew distinctly the judge said he could not accept the change of the plead, and Mr. Babcock explained to him that this was different, and that he could accept the change of the plead" (R. 66). Judge Lederle asked her if the

indictment had been explained to her, and she replied in the affirmative, though according to her testimony it "had not been fully explained" to her (R. 67-68). He also asked her if she was pleading guilty because she felt she was guilty, and she said, "Yes," though according to her testimony this was not true (R. 68). A "note" was handed her to sign and according to her testimony she objected because it mentioned something about a trial, but Babcock told her it was all right to sign it and she did so (R. 66-67). On cross-examination, petitioner testified that (R. 106) "I was so confused, and so nervous I did not hear what the judge said."

Hanaway denied that he told petitioner that it would be wiser to plead guilty (R. 124-125).⁴ Babcock denied that petitioner ever stated to him that she wanted to plead guilty although she was not guilty (R. 159), and Collard, who was present at the interview with Babcock on October 7, stated that he was "absolutely positive" that petitioner did not make such a statement to Babcock (R. 138). Furthermore, Collard testified, petitioner did not state that she wanted to plead guilty in order to cooperate; she said she wanted to plead guilty because she was guilty (R. 138). Babcock told petitioner that Judge Moinet, the judge who was handling her case, was not available on that day and that it would be much more convenient to wait

⁴ Collard was not questioned about this incident.

until another time, but petitioner said she wanted to enter her plea "right then" (R. 138).

Babcock testified that after petitioner announced to him her decision to plead guilty, he "recounted to her the normal procedure in the court room, telling her that when you appear before one of the United States District Judges, the Judge would ask if she was tendering her plea as a result of any promise made to her, whether it was a result of any threats upon her or whether it was because she was guilty. That he would also ask her if she desired to have counsel appointed to advise her." She reaffirmed her decision to plead guilty (R. 159).

Babcock further testified that after taking petitioner before Judge Lederle (R. 159), he informed the judge that petitioner wished him to make a motion to change her plea from that of not guilty to guilty (R. 160).

* * * Thereupon I recall the Court proceeded in the normal way. Now, the normal procedure is for the Court to ask the Defendant if the information given to the Court is correct, if the Defendant desires to plead guilty, and ask the Defendant if such plea of guilty is tendered by reason of any promises made to the Defendant, if such plea of guilty is made by reason of any threats made upon the Defendant, if such plea of guilty is their voluntary plea and made because the Defendant is guilty and if the Defendant de-

sires to have counsel appointed by the Court. First of all, if the Defendant has counsel of his or her choosing, and if not, if the Defendant desires counsel appointed by the Court to advise the Defendant in connection with the matter. Upon being satisfied that the action tendered by the Defendant is free and voluntary, without promises or threats of any kind and because the Defendant is guilty, the Court will then accept the plea of guilty and proceed with further disposition of the case. (*Ibid.*)

Babcock denied that petitioner told him, when she signed the waiver, that the reason she was appearing there was because she did not want to go to trial; he testified that he observed petitioner reading the waiver and that she made no statement whatsoever to him regarding it (R. 162-163). He further testified relative to petitioner's understanding of the waiver (R. 166):

* * * Judge Lederle was extremely careful and meticulous to make sure, as he always does, that she understood what she was doing.

* * * * *

He interrogated her as to whether she wished to have counsel represent her and advised her as to signing a waiver of that right. Again, Mr. Field, I hope you understand, and I wish to say again that I have no distinct recollection now—let me put

it this way: if any of our Judges have missed doing that, I would have remembered that very distinctly.

Kirby testified (R. 133) that "the Judge inquired whether or not the plea of guilty was upon the suggestion of any Government agent," and petitioner said no.

Collard testified that he was in the court room and that Judge Lederle asked petitioner a number of questions but that he could not recall them all. He said that the judge "went to considerable pains to ask her the questions that he should have to guarantee the rights that she had, and to convince himself * * *" (R. 139).

Petitioner testified that, after leaving the court room, she told agents Kirby and Dunham that she should not have pleaded guilty, that she had done the wrong thing because she was not guilty (R. 72-73). Kirby denied that she made such a statement after leaving the court room, although he testified that much later, in January 1944, she made such a statement (R. 133). Dunham was not questioned about the matter. Collard testified that petitioner made no such remark either to him or to anyone else in his presence as she left the court room and returned to jail (R. 139).

At the conclusion of the testimony, the district judge found that petitioner had failed to sustain

the allegations of the petition by a preponderance of the evidence. He said (R. 170-171, 174):

In the petition filed in this cause the petitioner directly or by implication charges that the District Attorney having the case in charge and agents of the Federal Bureau of Investigation mislead her or made promises to her that, which at least some degree, influenced her action in pleading guilty to the charge. I am of the opinion that these charges have now been abandoned by the petitioner but for the purpose of the record I wish to state most vigorously that there was absolutely nothing in the testimony sustaining such charges or implications. The conduct of both the officials of the District Attorney's office and the agents of the Federal Bureau of Investigation were meticulous in safeguarding the rights of the petitioner and that the record is utterly bare of any support of petitioner's contentions.

The petitioner is a woman obviously of good education and above the average in intelligence. Her knowledge of English was fluent and ample. * * *

The only substantial question in this case is whether the petitioner intelligently and knowingly waived her constitutional rights. It was her obligation to sustain the allegations of her petition by a preponderance of evidence. Not only has she failed in this but I believe that the evidence

is overwhelming against her contentions. The petitioner is an intelligent, mentally acute woman. She understood the charge and the proceedings. She freely, intelligently and knowingly waived her constitutional rights. I conclude, therefore, that there is no merit in her petition and that it shall be dismissed together with the writ.

On appeal, the judgment of the district court was affirmed (R. 181), one judge dissenting (R. 189-198).

SUMMARY OF ARGUMENT

The only issue here is credibility, whether the district judge was warranted in finding, from the evidence adduced at the habeas corpus hearing, that petitioner, who was collaterally attacking the judgment of conviction, failed to sustain her burden of proving that she did not freely, intelligently and knowingly waive her right to counsel and her right to a trial of the charge against her. The present case does not involve the legal sufficiency of her allegations or of her testimony. The question is whether the trial judge, who saw and heard the petitioner and the other witnesses, was bound to believe her inconsistent, contradicted, interested tale, which differed in numerous and significant particulars from one she had advanced when, acting through counsel some eighteen months earlier, she had moved to withdraw her plea of guilty.

I

Petitioner bore the burden of proving by a preponderance of evidence that she did not intelligently waive her right to counsel. The district judge found not only that she failed to sustain this burden but that the overwhelming weight of the evidence pointed to a knowing waiver. This finding was clearly correct.

Petitioner is an intelligent, mentally acute woman. Her background negatives a cringing attitude; and the record reflects a not inconsiderable shrewdness. She was advised by Judge Moinet of her right to counsel on the occasion of her original arraignment, and an attorney was in fact appointed to represent her at the arraignment; on his advice she stood mute. She was also told that another attorney would be appointed to represent her at subsequent proceedings. The only reason why another attorney was not appointed was that she thereafter decided she did not desire the further assistance of counsel, and she so advised the court when she changed her plea to guilty.

Prior to her change of plea, petitioner's husband made every effort to induce her to retain counsel, but she forcefully repudiated the idea. The F. B. I. agents likewise advised her to engage counsel. She admitted that the reason why she did not change her plea to guilty on Septem-

ber 28, 1943, was her husband's insistence that she consult an attorney first.

The only decision petitioner had difficulty in making was whether to plead guilty or not, and on this she wanted to make up her own mind. After attempting, unsuccessfully, to attach conditions to her proffered plea of guilty, she finally decided to plead guilty unconditionally. Before accepting her change of plea on October 7, 1943, Judge Lederle was careful to ascertain that she was fully cognizant of her right to counsel and voluntarily waived it, that she pleaded guilty because she believed herself guilty, and that such plea was not made at the suggestion of any government agent.

II

The only possible basis for a contention that petitioner may not have intelligently pleaded guilty was her testimony that an F. B. I. agent gave her erroneous advice to the effect that mere association with criminal conspirators was sufficient of itself, without criminal intent, to make a person guilty of criminal conspiracy. But the only evidence to that effect was petitioner's own statement. The agent concerned did not admit the giving of such erroneous advice, and the remainder of his testimony was inconsistent with any such admission. Furthermore, petitioner's testimony on cross-examination contradicted her own statement that she did not understand the

charge and that she was misled by the agent's advice into thinking herself guilty.

The district judge did not believe petitioner's testimony that she misunderstood or was misinformed as to the nature of the charge. He was fully justified in refusing to give her credence, in view of her self-contradictions, in view of the fact that in many respects she was specifically contradicted by other witnesses, and particularly in view of the circumstance that her story of receiving misleading advice from an F. B. I. agent first appeared in her petition for habeas corpus, filed in February 1946, and did not appear in her affidavit in support of her motion to withdraw her plea of guilty, which she had filed through an attorney eighteen months earlier.

The district judge was thus amply warranted in disbelieving petitioner's self-serving, contradictory, and in some aspects inherently incredible story; and an appellate court, which did not see and hear the witnesses, is in no position to say that he erred in rejecting a story so obviously the result of recent contrivance.

ARGUMENT

It is essential at the outset to emphasize the issue which is—and the issues which are not—before this Court.

The present case does not involve a direct attack upon a conviction by way of appeal or certiorari on the ground that, in a federal court,

petitioner was denied assistance of counsel in violation of the Sixth Amendment (*Glasser v. United States*, 315 U. S. 60), or was denied such assistance in a state court in violation of the Fourteenth (*Powell v. Alabama*, 287 U. S. 45).

Nor does the present case turn on the sufficiency of allegations in a collateral attack upon a conviction by way of habeas corpus, a question which has been frequently considered here of late years. Most of those instances, whether they involved collateral attack upon federal judgments in federal habeas corpus proceedings,⁵ or upon state judgments in state habeas corpus proceedings,⁶ or upon state judgments in federal habeas corpus proceedings,⁷ involved only matters of pleading; there, when the allegations were found to state a cause of action, the familiar pattern has been a remand to enable the petitioner to establish the truth of his allegations.

Neither does the present case pose the question whether, upon undisputed facts, or upon facts found by the trier of facts, the petitioner is en-

⁵ *Johnson v. Zerbst*, 304 U. S. 458; *Walker v. Johnston*, 312 U. S. 275; *Waley v. Johnston*, 316 U. S. 101; *United States ex rel. McCann v. Adams*, 320 U. S. 220; cf. *Frame v. Hudson*, 309 U. S. 632.

⁶ *Smith v. O'Grady*, 312 U. S. 329; *Hysler v. Florida*, 315 U. S. 411; *Cochran v. Kansas*, 316 U. S. 255; *Pyle v. Kansas*, 317 U. S. 213; *Williams v. Kaiser*, 323 U. S. 471; *Tomkins v. Missouri*, 323 U. S. 485; *Rice v. Olson*, 324 U. S. 786; *Hawk v. Olson*, 326 U. S. 271.

⁷ *House v. Mayo*, 324 U. S. 42; cf. *Ex parte Hawk*, 321 U. S. 114.

titled to be released from state^a or federal^a custody. Nor are any procedural or jurisdictional questions raised.¹⁰

The only issue in this case is whether the district judge was warranted in finding (R. 170, 174), from the evidence adduced at the habeas corpus hearing, that petitioner failed to sustain her burden of proving that she did not freely, intelligently, and knowingly waive her right to the assistance of counsel, of proving that she did not freely, intelligently, and knowingly plead guilty, and of proving that she was misled or influenced by federal agents in pleading guilty. Whether or not petitioner did so waive her rights, whether she was improperly influenced, were purely questions of the credibility of witnesses. Those questions the district judge resolved against petitioner. We submit that he was amply justified in so doing.

^a *Betts v. Brady*, 316 U. S. 455; *Canizio v. New York*, 327 U. S. 82; *De Meerleer v. Michigan*, 329 U. S. 663; *Gayes v. New York*, 332 U. S. 145.

^b *Bowen v. Johnston*, 306 U. S. 19; *Adams v. United States ex rel. McCann*, 317 U. S. 269.

¹⁰ E. g., the procedural requirements under the federal habeas corpus statute (*Holiday v. Johnston*, 313 U. S. 342), or the jurisdiction of this Court in habeas corpus proceedings, whether original (*Ex parte Hawk*, 321 U. S. 114) or appellate (*White v. Ragen*, 324 U. S. 760; *Woods v. Nierstheimer*, 328 U. S. 211), or the scope of review where jurisdiction to review exists (*Carter v. Illinois*, 329 U. S. 173; *Foster v. Illinois*, 332 U. S. 134).

As this Court said in *Hawk v. Olson*, 326 U. S. 271, 279, the right to a hearing, "of course, does not mean that uncontradicted evidence of a witness must be accepted as true on the hearing. Credibility is for the trier of facts. The evidence may show that * * * petitioner * * * had ample opportunity to consult with counsel * * *. He may have intelligently waived his constitutional rights. * * * Petitioner carries the burden in a collateral attack on a judgment. He must prove his allegations but he is entitled to an opportunity."

Here petitioner had full opportunity to prove her allegations. But she failed to do so. She was disbelieved; properly so, as we shall show. And, once more, we emphasize the sole issue here: credibility. Petitioner's brief follows the error of the dissenting judge below (R. 196, 197) in assuming, in the vital instances, the truth of her own rejected testimony (Br. 12, 36, 48-49).

I

THE DISTRICT JUDGE WAS WARRANTED IN FINDING THAT PETITIONER INTELLIGENTLY WAIVED HER RIGHT TO COUNSEL

The record of the convicting court shows that petitioner was advised by the court of her right to counsel, that she was asked by the court whether she desired that counsel be assigned her, and that she thereupon, in open court, voluntarily waived her right to counsel (R. 35-36). In her

petition for a writ of habeas corpus, petitioner attacked this record of the convicting court by alleging that she "was neither aware nor properly advised of her right to have the assistance of counsel for her defense and did not understandingly waive the same" (R. 2). The burden of proving this allegation by a preponderance of evidence, of course, rested upon petitioner. *Johnson v. Zerbst*, 304 U. S. 458, 468-469; *Hawk v. Olson*, 326 U. S. 271, 279. The district judge found not only that petitioner failed to sustain this burden, but that the overwhelming weight of the evidence was against her allegations (R. 170, 174). We submit that this finding is clearly correct, and that petitioner's testimony at the hearing below that she was unaware of her right to counsel was, from the evidence as a whole, including her own admissions, utterly incredible. Nothing in the dissenting opinion below, moreover, suggests that petitioner may have been unaware of her right to counsel. The dissenting judge based his dissent on an entirely different ground, hereafter to be discussed under Point II.

The record establishes that petitioner is an intelligent, mentally acute woman of good education, and that despite the fact that she was living, prior to her arrest, with two of her children, one of whom was a diabetic requiring a good deal of attention (R. 48), she led a fairly active social life. The record moreover establishes that she was a

purposeful and strong-willed individual who made up her own mind and was insistent upon doing so.

Her intelligence impressed the trial judge at the very outset of the hearing (R. 49), and it is manifest from the record that, throughout her testimony, she exhibited qualities of considerable shrewdness. Even the cold record shows that this woman was no terrified ignoramus, and while on occasion she lapsed into unidiomatic English, the quality of her diction in other parts of her testimony was unexceptionable. The trial judge, who observed her demeanor and so had opportunity to judge the genuineness of the lapses, considered her English to be fluent. And it is significant that, at the time of her plea in 1943, she had lived in the United States some sixteen or seventeen years (R. 70), her husband was an instructor at the University, and she had a German title of nobility. This petitioner, clearly, was no cringing illiterate suddenly transported to a foreign land.

By petitioner's own admission, she was advised of her right to be represented by counsel, notwithstanding her inability to pay for legal assistance, on the occasion of her original arraignment on September 21, 1943, at which time an attorney was in fact appointed to represent her and did represent her, though for purposes of the arraignment only. It cannot be disputed that this lawyer's services were entirely adequate for that purpose. Also by her own admission, she

was told by the court that another lawyer would be appointed to represent her in subsequent proceedings. While no other attorney ever did represent her, this was solely because she thereafter decided she did not desire counsel, despite repeated advice from numerous sources that she should get counsel; and she advised the court that she did not desire counsel when, two weeks after her original arraignment and entry of a plea of not guilty, she formally waived her right to counsel and changed her plea to guilty.

The record establishes that between the time of her original arraignment and her change of plea her husband, who, incidentally, had some training in German law (R. 97), made every effort to induce her to retain counsel (R. 60, 103, 131-132, 147-148). He sent two attorneys to visit her and talk to her about the case (R. 91-92, 114). While they told her that they were there as friends of her husband and not as attorneys (R. 116), she herself admitted that they asked her whether she planned to retain counsel and that she explained to them that counsel was to be appointed for her (R. 93). The F. B. I. agents on numerous occasions likewise advised her to engage counsel (R. 129, 147, 153). Notwithstanding her testimony that she "was wondering about the lawyer who never came" (R. 103), i. e., the lawyer the court promised to appoint for her, her statements and conduct clearly indicated that

she not only was not anxious for the promised attorney to come, but that she forcefully repudiated the idea of counsel both to her husband and to the F. B. I. agents (R. 131-132, 137, 147-148). She became annoyed at her husband's insistent attitude on the matter and told one agent that her visits with her husband were "unpleasant" because "he wanted her to have advice before she did anything" (R. 148). By her own admission, the reason why she did not plead guilty on September 28, 1943, when she had her first interview with Babcock, was because her husband pleaded with her not to take such action before consulting an attorney (R. 60, 103-104). She also admitted that when she announced to Collard and Hanaway on October 7, 1943, that she had finally decided to plead guilty, they asked her whether she had consulted with her lawyer about such a course of action (R. 63). In view of these admissions, we submit that her negative answer to the question, "Then you knew at that time that you were entitled to a lawyer before you pled guilty, if you wanted one?" (R. 103), is manifestly unworthy of credence.

The evidence showed that the only decision she was having difficulty in making was whether to plead guilty or not, and on this she wanted to make up her own mind (R. 60, 131-132, 135, 137, 148, 158). The only considerations which she deemed important in making this decision

were her chances, if she pleaded guilty, of never being deported, of being incarcerated in an institution close to her home in the event she was sentenced to imprisonment, and of securing an end to the unfavorable publicity which had attached to the case and which was adversely affecting her husband's employment and standing in the community (*supra*, pp. 18-20). She sought to secure some sort of guarantee from the prosecuting attorney that these three "conditions" would be fulfilled if she pleaded guilty, but he, of course, could not and did not make any such guarantee (*supra*, pp. 19-20). Nevertheless, she decided after further deliberation to plead guilty anyway, and to take her chances on the realization of her desires in the matter. She then announced her decision to the prosecuting attorney, who satisfied himself that she wished to plead guilty because she felt that she was guilty (R. 159). The prosecuting attorney then brought her before Judge Lederle to effect the change of plea. The judge accepted her plea of guilty only after satisfying himself by careful questioning that the plea was not the result of threats or promises but of a sense of guilt, and that, with knowledge of her right to counsel, petitioner voluntarily waived that right (*supra*, pp. 26-29).

That Judge Lederle was careful to ascertain, before accepting petitioner's plea of guilty, that she was fully cognizant of her right to counsel and voluntarily waived it, was not only definitely

established by the testimony of Babcock and the agents who were present (*supra*, pp. 26-29), but corroboration is to be found in petitioner's own admission that the judge was at first unwilling to accept her change of plea because of "something about an attorney," though she later expressed uncertainty as to just what "about an attorney" disturbed him (R. 66, 107).

As the court below pointed out (R. 186), this case is entirely unlike *De Meerleer v. Michigan*, 329 U. S. 663. There, "At no time was assistance of counsel offered or mentioned" to the 17-year-old defendant (329 U. S. at 665). Here, by petitioner's own admission, when she appeared before Judge Lederle to change her plea to guilty, he at first said that he could not accept the change of plea because an attorney should be present. It was only after he satisfied himself, by carefully interrogating her, that petitioner desired to plead guilty without counsel that he accepted her plea. Thus, as the court below further observed (R. 186), petitioner "had already been informed by one judge that she was entitled to an attorney appointed by the court, and now a second judge put the specific question to her, whether she was represented by counsel, whether she wished counsel assigned by the court, and she said no."

Petitioner's testimony (R. 73) that she was not aware when she pleaded guilty of the presumption of innocence enjoyed by defendants in American courts and did not learn of it until

two or three months thereafter is, we submit, without special significance in this case. Advice regarding this presumption is but one of the many kinds of advice a lawyer may be expected to give his client, and the evidence overwhelmingly established that petitioner freely and intelligently waived her right to counsel. The right of the Government and the courts to rely on a free and intelligent waiver of the right to counsel would obviously be illusory if every defendant who made such a waiver and was thereafter convicted, whether on a plea of guilty or otherwise, could then revoke his waiver and secure a new trial on the ground that he would have adopted different tactics if he had known something that an attorney might have told him.

What was said in *Adams v. United States ex rel. McCann*, 317 U. S. 269, 276-277, covers this case exactly:

It hardly occurred to the framers of the original Constitution and of the Bill of Rights that an accused, acting in obedience to the dictates of self-interest or the promptings of conscience, should be prevented from surrendering his liberty by admitting his guilt. The Constitution does not compel an accused who admits his guilt to stand trial against his own wishes. Legislation apart, no social policy calls for the adoption by the courts of an inexorable rule that guilt must be determined only by

trial and not by admission. A plea of guilt expresses the defendant's belief that his acts were proscribed by law and that he cannot successfully be defended: It is true, of course, that guilt under § 215 of the Criminal Code, which makes it a crime to use the mails to defraud, depends upon answers to questions of law raised by application of the statute to particular facts. It is equally true that prosecutions under other provisions of the Criminal Code may raise even more difficult and complex questions of law. But such questions are no less absent when a man pleads guilty than when he resists an accusation of crime. And not even now is it suggested that a layman cannot plead guilty unless he has the opinion of a lawyer on the questions of law that might arise if he did not admit his guilt. Plainly, the engrafting of such a requirement upon the Constitution would be a gratuitous dislocation of the processes of justice. The task of judging the competence of a particular accused cannot be escaped by announcing delusively simple rules of trial procedure which judges must mechanically follow. The question in each case is whether the accused was competent to exercise an intelligent, informed judgment—and for determination of this question it is of course relevant whether he had the advice of counsel. But it is quite another matter to suggest that the Constitution unqualifiedly deems an accused in-

competent unless he does have the advice of counsel. If a layman is to be precluded from defending himself because the Constitution is said to make him helpless without a lawyer's assistance on questions of law which abstractly underlie all federal criminal prosecutions, it ought not to matter whether the decision he is called upon to make is that of pleading guilty or of waiving a particular mode of trial. Every conviction, including the considerable number based upon pleas of guilty, presupposes at least a tacit disposition of the legal questions involved.

II

THE DISTRICT JUDGE WAS WARRANTED IN FINDING THAT PETITIONER INTELLIGENTLY PLEADED GUILTY

The dissenting judge below did not question that petitioner, with knowledge of her right to counsel, freely waived the right. Rather, the sole basis of his dissent was his belief that the record established that an agent of the F. B. I., in all honesty, but erroneously, advised petitioner that she was guilty of conspiracy if she merely conferred with people who later turned out to be criminals, that in reliance on the truth of this advice petitioner felt her case was hopeless, and that, believing that the retention of counsel would be superfluous under the circumstances, she decided to plead guilty without the advice of counsel (see R. 197). It was only because the dissenting

judge believed the record established the giving of this misleading advice that he felt petitioner "did not competently and intelligently waive her right to counsel" and did not intelligently plead guilty (*ibid.*).

The only evidence in the record, however, that an F. B. I. agent gave petitioner this erroneous advice is her own statement to that effect, which the district judge certainly was not required to, and obviously did not, believe (R. 170, 174). Petitioner gained her erroneous impression of what was required to make one a conspirator, she testified, from the agent's explanation of the indictment by the use of a hypothetical illustration involving "rum runners," in which an innocent person who associated with criminal conspirators became himself a criminal conspirator (R. 55). Collard, the agent involved, did not, however, admit that he ever misinformed petitioner. In fact, he testified that he had no recollection of ever having used an illustration of conspiracy involving "rum runners" (R. 142), much less that he ever attempted to explain a conspiracy by any illustration in which one of the "conspirators" lacked the essential requirement of criminal intent. He admitted the possibility that he might have used an illustration involving "rum runners" (R. 143), but he certainly did not admit, as the dissenting judge seems to have assumed (see R. 194), that he might have given any such illus-

tration in the manner attributed to him by petitioner—that is, in such a way as to indicate guilt of conspiracy by one innocent of all criminal intent. He testified that he attempted, at petitioner's behest, to explain to her the meaning of conspiracy to the best of his ability (R. 142). He further restated his belief, expressed earlier in an affidavit opposing petitioner's motion to withdraw her plea of guilty, that petitioner's plea was her free and voluntary act made after due consideration "with a full and complete understanding of the charge made against her in the indictment in the instant case" (R. 146). Such a statement would have been entirely inconsistent with any admission on his part that he gave petitioner misleading information: It strains credulity, moreover, to believe that an F. B. I. agent, a qualified attorney who had practiced law (R. 140) could himself believe, and honestly advise another, that a person could be guilty of a criminal conspiracy which was punishable by death (see 50 U. S. C. 32, 34) without any criminal intent or even knowledge of the existence of the conspiracy. It is even more incredible that he should have stated, as petitioner testified he stated (R. 76, 77), that the indictment which charged so serious a crime did not "mean much of anything," that "those charges don't mean a thing."

Furthermore, as the majority opinion below points out (R. 184), petitioner's own testimony

on cross-examination contradicted her statement that she did not understand the charge. She testified that after having read the indictment she felt innocent—"definitely so"—of the charges contained in it. The cross-examiner then observed that she must have known what the charges were. Confronted with this logical conclusion, she lamely explained, "Oh, no, and so far I might explain that to you, I knew * * * not what the charges were, but I knew as I said before that I saw I was accused of something of which I was not guilty. That was how I understood that." (R. 90-91.) A little later on, petitioner was asked whether she still felt innocent of the charges after talking to Collard and hearing his explanation of the indictment. She stated that she did still feel innocent. (R. 91.) Obviously, this answer was utterly inconsistent with her contention that she was misled by Collard into believing that innocent association with criminal conspirators sufficed to make her guilty. It will be recalled, too, that the attorney who represented petitioner at her original arraignment, and certainly a disinterested witness, as the court below noted (R. 183), testified without contradiction that petitioner indicated to him that she understood what "this was all about" (R. 111, 113).

Petitioner admittedly read the entire indictment (R. 90), and there was evidence that she

had marked the paragraphs concerning her (R. 140, 142). She admitted reading five overt acts (R. 91), the precise number out of forty-seven alleged (R. 25-34) which concerned her. It is difficult to believe that a "mentally acute" woman, "obviously of good education and above the average in intelligence," and having a "fluent and ample" command of English (R. 171, 174; see also R. 183), could read the overt acts without observing, and perceiving some significance in, the qualifying words, repeated in each like a refrain—"in pursuance of said conspiracy and to effect the object and purpose thereof." The nature of the conspiracy thus referred to was set forth in detail in the first part of the indictment, which, of course, also mentioned petitioner by name (R. 20-25). It would take very little knowledge of English, indeed, to read and understand, at least generally, the nature of the charge and its gravity.

It should be noted that petitioner testified that the agent gave her the "ram runners" illustration after she pointed out to him that she had not committed a particular overt act alleged in the indictment to have been performed by her (*supra*, p. 15). It seems reasonable to believe that the agent merely illustrated the well-established rule of law that a member of a conspiracy is liable for overt acts performed by others. *Pinkerton v. United States*, 328 U. S. 640, 646-647. As to his statement that he could not remember and that it was possible

that petitioner asked him "whether merely conferring with people who later turned out to be guilty of criminal acts would also make her a criminal" (R. 144), it should be recalled that the overt acts mentioning petitioner related to acts of meeting. And it certainly would be neither misleading nor improper to state that an act of conferring could be an overt act in furtherance of a conspiracy.

It is significant, moreover, that in her affidavit in support of her motion of August 7, 1944, for leave to withdraw her plea of guilty (R. 38-45), at a time when she was represented by counsel—by Okrent (R. 37), who had originally conferred with her at her husband's request—petitioner said not a word about Collard's use of any "rum runner" illustration to explain conspiracy, nor did she otherwise charge or suggest that Collard told her that a person innocent of all criminal intent would be guilty of conspiracy merely by virtue of having associated with conspirators. Surely, it seems to us, if Collard did so misadvise her, and if she pleaded guilty in reliance on such misadvice, she would have thought it of sufficient importance to include in this affidavit, which outlined at great length all the reasons why her plea of guilty was ill-considered.

Indeed, this circumstance—the undisputed and unexplained fact that the "rum runner" story nowhere appears in her August 1944 affidavit in sup-

port of her motion to withdraw her plea of guilty, and first emerges eighteen months later in her petition for habeas corpus—is almost conclusive proof, in and of itself, of the falsity of her tale about Collard's advice.

The district judge, who heard and observed the witnesses, obviously did not believe that Collard had misinformed petitioner, or even that petitioner was uninformed. He found that she “understood the charge and the proceedings” (R. 174), and further found that her allegations concerning the F. B. I. agents were false. He said (R. 170):

In the petition filed in this cause the petitioner directly or by implication charges that the District Attorney having the case in charge and agents of the Federal Bureau of Investigation mislead her or made promises to her that, which at least some degree, influenced her action in pleading guilty to the charge. I am of the opinion that these charges have now been abandoned by the petitioner but for the purpose of the record I wish to state most vigorously that there was absolutely nothing in the testimony sustaining such charges or implications. The conduct of both the officials of the District Attorney's office and the agents of the Federal Bureau of Investigation were meticulous in safeguarding the rights of the petitioner and that the record is utterly bare of any support of petitioner's contentions.

And, we submit, he was amply warranted in refusing to believe petitioner's testimony that she was misled by the agent. As we have indicated in the Statement, petitioner's testimony at the hearing was replete with self-serving statements which, in numerous particulars, were contradicted by her own witness Berger, as well as Babcock and the F. B. I. agents.

Moreover, as to one incident concerning Collard which was mentioned in her August 1944 affidavit, her version at the hearing was materially different (cf. note 3, *supra*, p. 21). This incident concerned Collard's reply to a certain question put to him by petitioner. Whereas Collard's reply was admittedly, according to the earlier version, "a perfectly proper and normal answer," the later version of the same incident seems deliberately to have been colored so as to put the good faith of Collard's answer in serious doubt.

In addition, several of petitioner's self-serving statements were, we submit, inherently incredible. See, particularly, her testimony on cross-examination that she did not know, after her husband urged her not to plead guilty without consulting a lawyer, that she was entitled to a lawyer if she wished one, and that she did not know she did not have to plead guilty if she did not want to (R. 103). See also her testimony that the reason why she kept asking the F. B. I. agents for advice as to how to plead was because "There was nobody else I could ask" (R. 96). Not only did

she have ample opportunity to ask such advice from her husband, but she admittedly was emphatically advised by him, as we have seen, not to plead guilty without advice of counsel. Likewise, she had the opportunity to ask attorneys Okrent and Berger, whom her husband sent to her, and, in fact, according to Berger, the "question of pleading guilty came up" in their conference with her (R. 120). Finally, and most important, she could, if she chose, have asked the advice of any attorney of her own choosing, or of a court-appointed attorney if she lacked the means of retaining counsel of her own choice. For, as we have urged before, petitioner certainly was aware of her right to counsel.

And, as we have already pointed out, there are vast discrepancies—and a time interval of eighteen months—between petitioner's sworn statements in support of her motion for leave to withdraw her plea of guilty and her sworn statements in her petition for a writ of habeas corpus. The grounds of the former were, in substance, merely that her plea of guilty was made under circumstances of extreme emotional stress, without knowledge of her legal rights and a thorough understanding of the nature of the offense charged, and without the assistance of counsel (R. 37, 38-45). The petition for habeas corpus, on the other hand, made the sweeping and serious charge that she was "coerced, intimidated and deceived" into pleading guilty, notwithstanding

her belief in her innocence (see R. 2). This substantial change in position during an interval fraught with significant consequences for petitioner¹¹ is, we submit, strong and convincing evidence against her general credibility.

¹¹After the filing, in this Court, of petitioner's motion for enlargement on recognizance, the Acting Solicitor General, on June 10 last, advised the Court of the pendency of deportation proceedings against petitioner.

The Department of Justice files indicate the occurrence of the following facts in the interval between petitioner's judgment of conviction on November 15, 1944 (R. 8) and her petition for habeas corpus, filed February 7, 1946 (R. 1):

On July 16, 1945, petitioner was ordered "interned" by the Attorney General as an alien enemy "potentially dangerous to the public peace and safety of the United States." On November 1, 1945, petitioner was advised that, by order of the Attorney General, issued pursuant to a Presidential proclamation of July 14, 1945, it had been determined she should be "removed and repatriated to the country of your nationality as soon as arrangements for your transportation can be made," subject to the privilege of a hearing before a hearing board appointed by the Attorney General prior to the issuance of a final order for her removal and repatriation. On November 14, 1945, petitioner requested a hearing on the question of whether she should be repatriated. Because of the fact that petitioner was serving a federal prison sentence, however, the requested hearing was not held, and the repatriation proceedings have been held in abeyance pending petitioner's release from imprisonment.

The institution of repatriation proceedings between petitioner's conviction and her filing of the petition for habeas corpus is, we think, significant in the light of the evidence that petitioner sought, unsuccessfully, to procure a "guarantee" that she would never be deported as a condition of her plea of guilty (*supra*, pp. 18-20), and of her testimony (R. 101) that it was "as to the deportation, about which I was worried most."

The record of the convicting court shows that petitioner, having been advised of her right to counsel, voluntarily and intelligently waived her right and pleaded guilty. The presumption of regularity which attaches to a judicial judgment is not lightly to be rebutted on collateral attack. *Johnson v. Zerbst*, 304 U. S. 458, 468-469; *Hawk v. Olson*, 326 U. S. 271, 279. Petitioner had a full and fair hearing of her contention that she did not knowingly and intelligently waive counsel and plead guilty. The issue presented to the district judge was fundamentally one of accepting or rejecting petitioner's testimony in respect of whether she knew of her right to counsel when she waived it and of the nature of the charge to which she pleaded guilty. The district judge, who observed petitioner's demeanor, rejected her testimony in those respects. The record establishes, if the government witnesses were entitled to any credence at all, that petitioner was not above misrepresenting the facts whenever it seemed to her advantage to do so. And the record, as a whole, strongly suggests recent contrivance.

We submit, therefore, that the district judge was amply justified in rejecting petitioner's testimony.

It is of course a commonplace among those familiar with trials that no printed record, however faithfully it may reproduce the language of

the witnesses, will ever convey to a reader the demeanor, or the nuances of expression, or the intonations of those whose words are set down in black and white. Yet it is precisely on just those particulars that the trier of facts must in large measure rely in weighing and assaying conflicting accounts of the same transaction.

It may appear, at a first reading, that a circumstantially detailed account of a particular conversation is intrinsically more reliable than the opposing witness's "I don't remember." But "I don't remember" may run the gamut from downright perjury to a thoroughly honest and complete evaporation of recollection, from the "*Non mi ricordo*" of the notorious Majocchi (*Queen Caroline's Trial*; see 3 Wigmore, *Evidence* (3d ed. 1940) § 995) to the genuine lack of memory on the part of a witness, who in the interval between the conversation in question and his testimony concerning it has participated in hundreds of other conversations in more or less similar circumstances.

Here the strongest point that petitioner could marshal in her favor was her story—which had not appeared in her August 1944 affidavit—of Collard's alleged account of the "rum runner" incident. Collard, testifying almost two and a half years after the alleged conversation, said he did not recall making any such statement. The dissenting judge below correctly characterized this as "the crucial and

decisive feature of the case" (R. 192), but fell into grave error (R. 196, 197) in calling the matter undisputed, and in undertaking to believe petitioner (R. 194) simply because Collard did not specifically deny the incident. For neither the circuit court of appeals nor this Court is in a position to reproduce the demeanor of petitioner when she told about the incident or that of Collard when he denied remembering it. The trial judge heard and saw both witnesses, and, thereafter, found that petitioner had not been misinformed as she alleged. That opportunity, we submit, renders it impossible for any appellate court to hold him wrong, even in the absence of specific contradiction of petitioner's story in this respect, particularly in view of the circumstances that petitioner was specifically contradicted in numerous other respects, that petitioner contradicted herself in many particulars, that she told an inherently improbable story, and—most significant—that her account of Collard's alleged advice nowhere appears in her August 1944 motion and first turns up in her habeas corpus petition of February 1946. All of these vital circumstances were overlooked by the dissenting judge below.

We are not suggesting here the application of any rigidly mechanical rule as to the inviolability of concurrent findings by two courts. We assume *arguendo* that this may be the kind of case where the normal standard of appellate review yields to a careful scrutiny *de novo* here (cf. *Knauer v.*

United States, 328 U. S. 654, 657). But we submit that, in a case such as this one, review *de novo* by two appellate courts still does not alter the inescapable and primary circumstance that the viewing and reviewing of a record in black and white cannot overcome the superior opportunities available to the trier of facts who saw and heard the witnesses.

We have here the case of an intelligent, purposeful, strong-minded woman who deliberately and consciously disregarded the advice, repeatedly pressed upon her from several quarters, to consult a lawyer. She insisted on proceeding without one, and pleaded guilty. Nearly two and a half years later, after the consequences of her act disappointed her expectations—i. e., after she was about to be deported—she alleged for the first time that she was tricked into pleading guilty by erroneous advice given her by a government agent. In the interim, although she had made a previous attempt, through counsel, to withdraw her plea of guilty, she had never stated that any such advice had been given her. After a full hearing on the allegations of her petition for habeas corpus, a district judge who saw and heard petitioner, the agent, and numerous other witnesses, disbelieved petitioner and made findings to that effect. These findings were concurred in by the majority of the court below.

To reverse those two courts now, simply because petitioner's story, in black and white and apart from the circumstance that it was never put forward earlier though opportunity to do so was presented, seems appealing, cannot, we strongly submit, be justified under any proper or accepted standards of appellate review or judicial administration. Moreover, to reverse those two courts now "would furnish opportunities hitherto un- contemplated for opening wide the prison doors of the land" (*Foster v. Illinois*, 332 U. S. 134, 139); would place a valuable premium on recent contrivance, now and in the future; and would do a lasting disservice to the administration of justice.

CONCLUSION

The judgment below was correct and should be affirmed.

Respectfully submitted.

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NOVEMBER 1947.

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SUPREME COURT OF THE UNITED STATES

No. 73.—OCTOBER TERM, 1947.

Marianna von Moltke, Petitioner,

v.

A. Blake Gillies, Superintendent of
the Detroit House of Correction.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[January 19, 1948.]

MR. JUSTICE BLACK announced the judgment of the Court and an opinion in which MR. JUSTICE DOUGLAS, MR. JUSTICE MURPHY, and MR. JUSTICE RUTLEDGE concur.

The petitioner was indicted for conspiracy to violate the Espionage Act of 1917.¹ The specific charge was that, in order to injure the United States and to aid the German Reich, she and twenty-three others had conspired during the second World War to collect and deliver vital military information to German agents.

With no money to hire a lawyer and without the benefit of counsel the petitioner appeared before a federal district judge, told him that the indictment had been explained to her, signed a paper stating that she waived the "right to be represented by counsel at the trial of this cause," and then pleaded guilty. Under her plea she could have been sentenced to death or to imprisonment for not more than thirty years. After thirteen months in jail following her plea, the court sentenced her to four years in prison.

In this habeas corpus proceeding she charged that the sentence, resting as it did solely on her plea of guilty,

¹ Section 32 defines the substantive crime of espionage. Section 34 declares conspiracies to violate § 32 to be unlawful. 40 Stat. 217, 50 U.S.C. §§ 32, 34.

was invalid for two reasons: First, she alleged that the plea was entered by reason of the coercion, intimidation, and deception of federal officers in violation of the due process clause of the Fifth Amendment. Second, she alleged that she neither understandingly waived the benefit of the advice of counsel nor was provided with the assistance of counsel as required by the Sixth Amendment. As the Government concedes, these charges entitle the petitioner to have the issues heard and determined in a habeas corpus proceeding, and, if true, invalidate the plea and sentence.² The District Court heard evidence offered by both the petitioner and the Government, and then found that she had failed to prove either contention. The Sixth Circuit Court of Appeals affirmed, with one judge dissenting. 161 F. 2d 113.

On the basis of what he designated as "the undisputed evidence," the dissenting judge concluded that petitioner had pleaded guilty because of her reliance upon the legal advice of a Federal Bureau of Investigation (FBI) lawyer-agent, which advice "was though honestly given, false." Neither the District Court nor the majority of the Circuit Court of Appeals controverted this conclusion of the dissenting judge. A challenge to a plea of guilty made by an indigent defendant, for whom no lawyer has been provided, on the ground that the plea was entered in reliance upon advice given by a government lawyer-agent, raises serious constitutional questions. Under these circumstances we granted certiorari in this case. 331 U. S. 800.

It thus becomes apparent that determination of the questions presented depends upon what the evidence showed. There was conflicting testimony on many points in this case. We do not attempt to resolve these con-

² *Waley v. Johnston*, 316 U. S. 101; *Walker v. Johnson*, 312 U. S. 275, 286; *Johnson v. Zerbst*, 304 U. S. 458, 467; cf. *Sunal v. Large*, 332 U. S. 174, 177.

facts. Our conclusion is reached from the following facts shown by the testimony of government agents or by undisputed evidence offered by petitioner.

The petitioner was born in Germany. In that country she bore the title of countess. She and her husband came to the United States in December, 1926. Since 1930 they have lived in Detroit where the petitioner has been a housewife and her husband an instructor in German at Wayne University. Her husband is a naturalized citizen of the United States; her own naturalization papers have been pending for some time. They have four children, three of whom were born in this country as American citizens.

August 24, 1943, between 6 and 7 a. m. six FBI agents came to their home. The petitioner was in bed. She was informed that she must get up and go with them. The home was searched with her husband's permission. She was taken to the local office of the FBI, fingerprinted, photographed, and examined by a physician. From there she was taken to the Immigration Detention Home, placed in solitary confinement, and, with one exception noted below, not permitted to see or communicate with anyone outside for the next four days. Two FBI agents persistently but courteously examined her every day from about 10 a. m. until about 9 p. m. She knew nothing about her arrest and detention except that she was being held indefinitely on a presidential warrant "as a dangerous enemy alien." She was informed "that the FBI is an investigating agency, and not a prosecuting, and as an enemy alien I [she] was not allowed to see an attorney." During this first period of questioning, the only relaxation of petitioner's incommunicado status was a single permission to relay instructions through an FBI agent to her husband who was told how to look after their nine-year-old diabetic child. This child, for whom the mother had specially cared since his infancy, required a strict diet and injections twice daily.

September 1, eight days after her early morning arrest, petitioner was taken before an Enemy Alien Hearing Board. She was not then informed of any specific charges against her, but she was told that she could not be "represented by a legal attorney" at the hearing. The results of this hearing were not made known to her. At its conclusion she was returned to the detention home.

September 18 the petitioner was handed the indictment against her. In our printed record this document covers a little more than fourteen pages. It charges generally, in the language of the statute, that the twenty-four defendants conspired to violate the statute. It also enumerates 47 overt acts alleged to have been performed in pursuance of the objects of the conspiracy, five of which acts specifically refer to the petitioner. Four out of the five merely allege that the petitioner "met and conferred with" one or more of the other defendants; the fifth alleges that she "introduced" someone to one of the defendants.

September 21, almost a month after her arrest, the petitioner and a co-defendant, Mrs. Leonhardt, were taken to the courthouse for arraignment. Upon being told that the two defendants had no attorney and no means to obtain one, the judge said he would appoint counsel right away and would not arraign them until they had seen an attorney. They were then led "to the bull pen to wait for the attorney." Before any attorney arrived they were taken back into the courtroom. Court was in session. As explained by petitioner and corroborated by others, "Judge Moinet was on the bench, and there seemed to be a trial going on because Judge Moinet appointed a lawyer in the courtroom. He said 'Come here, 'so and so,' and help these two women out,' and the young lawyer objected to that; he said he didn't want to have anything to do with that. But then he consented just for the arraignment, to help out, and he came over to us—we were sitting on the

side bench, and he asked me, 'How do you want to plead?' I said: 'Not guilty.' And he asked Mrs. Leonhardt and she said the same thing. So he told us that, he whispered to us, in fact, he went over it, whispered that it would not be advisable, but I do not know even now why, but he suggested it would be proper to stand mute." In this two to five minute whispered conversation (the lawyer said "a couple of minutes") the lawyer asked both defendants if they "understood what this was all about." They indicated that they did. He did not even see the indictment, did not inform the petitioner as to the nature of the charge against her or as to her possible defenses, and did not inquire if she knew the punishment that could be imposed for her alleged offense. The case on trial was then interrupted, the charge was made against the defendants, who stood mute, and a plea of not guilty was entered. With reference to their future representation by an attorney, the petitioner's uncontradicted testimony was that the judge "said he would appoint an attorney right away, and I understood that the gentleman was to be expected to come right away."

The two women, unable to get out on bond, were then immediately taken from the courthouse to the Wayne County jail. The matron there informed the petitioner that she had strict orders to hold the petitioner and Mrs. Leonhardt "incommunicado." Notwithstanding this order, however, the FBI agents continued to visit and talk with both of them and a third defendant, Mrs. Behrens, every day except Sunday. During this period all three of them were allowed to read and discuss among themselves the unfavorable newspaper reports which their arrest and indictment had occasioned. They talked also with the FBI agents about this adverse publicity and about how they should plead to the charges.

September 25, one month and one day after Mrs. von Moltke's arrest, two lawyers came to the jail to see her.

They had been sent by her husband. One of them appears to have taken the husband's language course at Wayne University. These lawyers' message was the first communication she had been permitted to receive from her husband since her removal to the county jail. She had been so well shut off from the outside world that she thought he did not even know where she was then confined. These lawyers informed her that, although they had come at her husband's request, they would not represent her as counsel. Furthermore, they warned her that they would not even hold what she said in confidence, and that they would feel free to disclose anything she told them to the Government. Only one of the lawyers appeared at the trial. He testified that the petitioner was concerned during their visit for her children and her husband, whom the university had removed from his \$4,000 position the day after her arrest. She particularly inquired whether it would help her husband to get his university position back if she pleaded guilty, but received no counsel on the subject one way or another. In fact, the lawyers emphasized a number of times that they could not and would not advise her what she should do. Although they gave her a form of cross-examination regarding the charges against her in the indictment, they did not attempt to explain to her the implications of these charges, or to advise her as to any possible defenses to them, or to inform her of the permissible punishments under the indictment.

September 28, three days after the lawyers' visit, the petitioner and Mrs. Leonhardt were taken by FBI agents to the marshal's office where they talked with the assistant district attorney about what plea they should enter. Mrs. Leonhardt announced there that she would plead guilty, which plea she later entered, but the petitioner first asked for the opportunity of discussing the matter with

her husband. He came to the marshal's office, was allowed to talk with his wife in the "bull pen," and advised her not to do anything before she saw a lawyer. She then declined to plead guilty and was taken back to jail.

October 7, nine days later, she did plead guilty without having talked to any lawyer in the meantime except the FBI agent-attorneys, although she had seen her husband several more times. A few days before the 7th, Mrs. Behrens had entered a plea of guilty, and rumors reached the petitioner that other defendants named in the indictment would also plead guilty. During the interval between the 28th of September and petitioner's plea of guilty on the 7th of October, the FBI men had talked to her daily. She had particularly asked them whether under United States law she would have the right to a trial if all her co-defendants pleaded guilty. The agent's reply, as he remembered it, was "that the question of trial would be up to the United States attorney's office." She also repeatedly plied the agents with questions as to what plea she should enter in order to reduce as much as possible the injurious publicity of the affair; and what would be the least harmful course to make it possible for her husband to recover his old position. She was also vitally interested in whether she would be deported, and whether, if she did plead guilty, her sentence could be served close to her family. All of these subjects the agents talked over with her in their daily conversations and one of them offered to, and did, discuss them with the assistant district attorney on her behalf. Following this discussion, the agent brought back word to the petitioner that the assistant district attorney could not control deportation, publicity, or the place of her imprisonment, but that if she pleaded guilty he would write a letter to the controlling authorities and recommend that she be imprisoned close to her family.

About this time one of the lawyer-agents of the FBI discussed the petitioner's legal problems with her at great length. According to his testimony he did his best to explain the implications of the indictment. She told this agent-attorney about a statement she had heard while in jail that unless she pleaded guilty her husband would be involved, and she asked the agent if this were true. He replied that he could not answer this question. She also asked one of the lawyer-agents whether mere association with people guilty of a crime—such association as that with which she was charged in the five overt acts—was sufficient in itself to bring about her conviction under the indictment. This agent, according to the petitioner, then explained the indictment to her by the use of a "Rum Runners" plot as an example. She testified that he said: "That if there is a group of people in a 'Rum' plan who violate the law, and another person is there and the person doesn't know the people who are planning the violation and doesn't know what is going on, but still it seemed after two years this plan is carried out, in the law the man who was present becomes . . . the person nevertheless is guilty of conspiracy" The FBI agent did not deny that he had given her the rum runner illustration. In fact, the agent said that it was quite possible that the conversation had occurred.³

During the ten days prior to her plea of guilty, petitioner had many conversations with FBI agents about how she should plead to the indictment. In resolving her doubts she had no legal counsel upon whom to rely

³ "Q. And did you during that discussion use a [sic] illustration about a rum runner?

"A. Well, I heard Mrs. von Moltke say that, and since she did I have been trying to recall, and I cannot remember such an illustration.

"Q. I see.

"A. But it is quite possible that Mrs. von Moltke's memory is better than mine, and I may have used such an illustration."

except the government lawyer-agents, since neither she nor her husband could afford a lawyer, and the counsel promised by Judge Moinet never appeared. Her chief concern in trying to decide whether to plead guilty was not the indictment, or possible imprisonment; as was testified by government agents, "She was concerned about her husband and his job," and "she was hoping to do whatever would be best for her husband and her child." That her troubled state of mind was recognized by the prosecuting attorney is shown by these leading questions he asked her on cross-examination:

"Q. Now, isn't it true that up until the time you plead [*sic*] guilty you repeatedly asked the agents for advice as to whether you should plead guilty or not? Isn't that true?

"A. There was nobody else I could ask.

"Q. Well, just say yes or no.

"A. Yes."

October 7, having reached a temporary decision, she went with two of the agents to the assistant district attorney and told him that she wanted to plead guilty. Since Judge Moinet was not available, she was taken before another judge who was unfamiliar with the case. At first he would not accept the plea of guilty because she then had no lawyer, and the record before him indicated that she had previously pleaded not guilty under the advice of counsel. But in response to the judge's questions, she said that she understood the indictment and was voluntarily entering a plea of guilty. The judge then permitted petitioner to sign a written waiver of counsel. The whole matter appears to have been disposed of by routine questioning within five minutes during an interlude in another trial. If any explanation of the implications of the indictment or of the consequences of her plea was then mentioned by the judge, or by anyone in his presence, the record does not show it. Nor is there

anything to indicate she was informed that a sentence of death could be imposed under the charges. The judge appears not to have asked petitioner whether she was able to hire a lawyer, why she did not want one, or who had given her advice in connection with her plea. Apparently he was not informed that the petitioner's only legal counsel had come from FBI agents.

Petitioner continued thereafter to worry about whether she had acted wisely in changing her plea to guilty. On learning in January, 1944, from an FBI agent that she could request permission to withdraw the plea, she sent messages to the district attorney, seeking such permission. Some months later Judge Moinet appointed counsel solely for the purpose of filing a motion for leave to withdraw her plea. Counsel did file such a motion, but its dismissal as tardy⁴ was required by the Criminal Ap-

⁴ Rule II (4) of the Criminal Appeals Rules, effective September 1, 1934, then required such motions to be filed within ten days after entry of the plea and before imposition of sentence. *Swift v. United States*, 148 F. 2d 361; see *Hood v. United States*, 152 F. 2d 431, 435; *United States v. Achther*, 144 F. 2d 49, 52. It has since been liberalized by Rule 32 (d) of the Federal Rules of Criminal Procedure, effective March 21, 1946.

Petitioner's brief states that the court denied her motion to withdraw the plea of guilty "without taking any testimony or permitting petitioner to take the stand. . . ." The Government has not challenged that statement. There is nothing in the record which indicates that the judge allowed any witnesses to testify on the motion. Nevertheless the judge, "after consideration of said motion and of the arguments presented," made purported findings of fact to the effect that she had pleaded guilty "after due and careful deliberation" and that at the time she entered the plea she "thoroughly understood the nature of the charge contained in the indictment." Neither the majority nor the minority opinion of the Circuit Court of Appeals referred to these so-called "findings" as a support for denial of the motion to withdraw the plea of guilty. The Circuit Court of Appeals simply justified the denial on the ground that the motion was filed "far too late."

peals Rules; even if the motion had been made when petitioner first learned of her rights. Had the motion to withdraw the plea of guilty not been tardy, the court would have been required to consider it in the light of what this Court declared in *Kercheval v. United States*, 274 U. S. 220, 223: "A plea of guilty differs in purpose and effect from a mere admission or an extra-judicial confession; it is itself a conviction. . . . Out of just-consideration for persons accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences."⁵

It is suggested that some adverse inference should be drawn against the petitioner because she failed to try to appeal from her conviction and sentence following the denial of her motion. In view of her counsel's appointment solely for "the purpose of moving that she be allowed to withdraw her plea" of guilty, it is questionable whether he had authority to prosecute an appeal from her conviction and sentence. At least the appointed counsel did not take an appeal and he was the only lawyer petitioner had. Furthermore, the futility of an appeal based

⁵ On this same subject see Orfield, *Criminal Procedure from Arrest to Appeal* (1947) at 300: "Since a plea of guilty is a confession in open court and a waiver of trial, it has always been received with great caution. It is the duty of the court to see that the defendant thoroughly understands the situation and acts voluntarily before receiving it." See also 4 Blackstone, *Commentaries* at 329: "Upon a simple and plain confession, the court hath nothing to do but to award judgment; but it is usually very backward in receiving and recording such confession, out of tenderness to the life of the subject; and will generally advise the prisoner to retract it and plead to the indictment," and Bowyer, *Commentaries on the Constitutional Law of England* (1846) at 355: "The civil law will not allow a man to be convicted on his bare confession, not corroborated by evidence of his guilt, because there may be circumstances which may induce an innocent man to accuse himself."

upon the trial court's refusal to permit the withdrawal of her plea was obvious, in view of her failure to meet the strict requirements of Rule 11 (4). It seems pretty plain that the petitioner has raised the question here in the only proper way—by habeas corpus proceedings.

We accept the government's contention that the petitioner is an intelligent, mentally acute woman. It is not now necessary to determine whether, as the Government argues, the District Court might reasonably have rejected much of petitioner's testimony. Nor need we pass upon the government's contention that the evidence might have supported a finding that the FBI lawyer-agent did not actually give her the erroneous advice that mere association with criminal conspirators was sufficient in and of itself to make a person guilty of criminal conspiracy. For, assuming the correctness of the two latter contentions, we are of the opinion that the undisputed testimony previously summarized shows that when petitioner pleaded guilty, she did not have that full understanding and comprehension of her legal rights indispensable to a valid waiver of the assistance of counsel.

First. The Sixth Amendment guarantees that an accused, unable to hire a lawyer, shall be provided with the assistance of counsel for his defense in all criminal prosecutions in the federal courts. *Walker v. Johnston*, 312 U. S. 275, 286; see *Foster v. Illinois*, 332 U. S. 134, 136-137. This Court has been particularly solicitous to see that this right was carefully preserved where the accused was ignorant and uneducated, was kept under close surveillance, and was the object of widespread public hostility. *Powell v. Alabama*, 287 U. S. 45. The petitioner's case bristled with factors that made it all the more essential that, before accepting a waiver of her constitutional right to counsel, the court be satisfied that she fully comprehended her perilous position. We were waging total war with Germany. She had a Ger-

man name. She was a German. She had been a German countess. The war atmosphere was saturated at that time with a suspicion and fear of Germans. The indictment charged that while this country was at war with Germany and Japan the petitioner had conspired with others to betray our military secrets to Germany. She had been kept in close confinement since her arrest. Many of her alleged co-conspirators had already pleaded guilty. If found guilty, she could have been, and many people might think should have been, legally put to death as punishment for violation of the Espionage Act. If not executed, she could have been imprisoned for thirty years or for such shorter period as the judge in his discretion might fix. Even when the trial court was about to impose sentence on this petitioner following her plea of guilty, a lawyer might have rendered her invaluable aid in calling to the court's attention any mitigating circumstances that might have inclined him to fix a lighter penalty for her. Anyone charged with espionage in wartime under the statute in question would have sorely needed a lawyer; Mrs. von Moltke, in particular, desperately needed the best she could get.

Second. A waiver of the constitutional right to the assistance of counsel is of no less moment to an accused who must decide whether to plead guilty than to an accused who stands trial. See *Williams v. Kaiser*, 323 U. S. 471, 475. Prior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered. Determining whether an accused is guilty or innocent of the charges in a complex legal indictment is seldom a simple and easy task for a layman, even though acutely intelligent. Conspiracy charges frequently are of broad and confusing scope, and that is particularly true of con-

spiracies under the Espionage Act. See, e. g., *Gorin v. United States*, 312 U. S. 19; *United States v. Heine*, 151 F. 2d 813. And especially misleading to a layman are the overt act allegations of a conspiracy. Such charges are often, as in this indictment, mere statements of past associations or conferences with other persons, which activities apparently are entirely harmless standing alone. A layman reading the overt act charges of this indictment might reasonably think that one could be convicted under the indictment simply because he had, in perfect innocence, associated with some criminal at the time and place alleged. The undisputed evidence in this case that petitioner was concerned about many of these legal questions—such as the significance of the overt act charges, and her possibilities of defense should all her co-defendants plead guilty—emphasizes her need for the aid of counsel at this stage.

Third. It is the solemn duty of a federal judge before whom a defendant appears without counsel to make a thorough inquiry and to take all steps necessary to insure the fullest protection of this constitutional right at every stage of the proceedings. *Johnson v. Zerbst*, 304 U. S. 458, 463; *Hawk v. Olson*, 326 U. S. 271, 278. This duty cannot be discharged as though it were a mere procedural formality. In *Powell v. Alabama*, 287 U. S. 45, the trial court, instead of appointing counsel particularly charged with the specific duty of representing the defendants, appointed the entire local bar. This Court treated such a cavalier designation of counsel as a mere gesture, and declined to recognize it as a compliance with the constitutional mandate relied on in that case. It is in this light that we view the appointment of counsel for petitioner when she was arraigned. This lawyer, apparently reluctant to accept the case at all, agreed to represent her only when promised by the judge that it would take only two or three minutes to perform

his duty. And it seems to have taken no longer. Even though we assume that this attorney did the very best he could under the circumstances, we cannot accept this designation of counsel by the trial court as anything more than token obedience to his constitutionally required duty to appoint counsel for petitioner. Arraignment is too important a step in a criminal proceeding to give such wholly inadequate representation to one charged with a crime. The hollow compliance with the mandate of the Constitution at a stage so important as arraignment might be enough in itself to convince one like petitioner, who previously had never set foot in an American courtroom, that a waiver of this right to counsel was no great loss—just another legalistic formality. We are unable to agree with the government's argument that the momentary appointment of the lawyer for arraignment purposes supports the contention that the petitioner intelligently waived her right to counsel. In fact, that court episode points in the other direction, for the judge then told the petitioner that he would appoint another lawyer "right away" for her—which he never did until long after she had pleaded guilty, too late to do her any good.

Fourth. We have said: "The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused."⁶ To discharge this duty properly in light of the strong presumption against waiver of the constitutional right to counsel,⁷ a judge must investigate as long

⁶ *Johnson v. Zerbst*, 304 U. S. 458, 465; see also *Adams v. United States ex rel. McCann*, 317 U. S. 269, 270.

⁷ *Johnson v. Zerbst*, 304 U. S. 458, 464; *Glasser v. United States*, 315 U. S. 60, 70.

and as thoroughly as the circumstances of the case before him demand. The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility. To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered.

This case graphically illustrates that a mere routine inquiry—the asking of several standard questions followed by the signing of a standard written waiver of counsel—may leave a judge entirely unaware of the facts essential to an informed decision that an accused has executed a valid waiver of his right to counsel. And this case shows that such routine inquiries may be inadequate although the Constitution “does not require that under all circumstances counsel be forced upon a defendant.” *Carter v. Illinois*, 329 U. S. 173, 174–175. For the record demonstrates that the petitioner welcomed legal aid from all possible sources; there would have been no necessity for forcing counsel on her.

Twice the court did designate counsel for petitioner. The first occasion was upon her arraignment. Petitioner appears willingly to have cooperated with this appointed counsel for the two or three minutes he was called upon to act. The second occasion was when counsel was named for the sole purpose of moving to withdraw her plea of guilty. Notwithstanding her unfortunate first encounter with court-appointed counsel and despite the fact that counsel was not designated the second time,

until it was obviously months too late to submit this motion under the procedural rules, there is no complaint that the petitioner failed to cooperate with him. And the record is filled with evidence from many witnesses that the petitioner persistently sought legal advice from all of the very limited number of people she was permitted to see during the period of her close incarceration before her plea of guilty was entered. It is apparent from the record that when she did plead guilty the slightest deviation from the court's routine procedure would have revealed the petitioner's perplexity and doubt. For the testimony of all the witnesses points unerringly to the existence of the uncertainty which was obviously just below the surface of the petitioner's statements to the judge.

Fifth. The right to counsel guaranteed by the Constitution contemplates the services of an attorney devoted solely to the interests of his client. *Glasser v. United States*, 315 U. S. 60, 70. Before pleading guilty this petitioner undoubtedly received advice and counsel about the indictment against her, the legal questions involved in a trial under it, and many other matters concerning her case. This counsel came solely from government representatives, some of whom were lawyers. The record shows that these representatives were uniformly courteous to her, although there is no indication that they ever deviated in the slightest from the course dictated by their loyalty to the Government as its agents. In the course of her association with these agents, she appears to have developed a great confidence in them. Some of their evidence indicates a like confidence in her.*

The Constitution does not contemplate that prisoners shall be dependent upon government agents for legal counsel and aid, however conscientious and able those agents may be.† Undivided allegiance and faithful, de-

*See note 3, *supra*.

voted service to a client are prized traditions of the American lawyer.⁹ It is this kind of service for which the Sixth Amendment makes provision. And nowhere is this service deemed more honorable than in case of appointment to represent an accused too poor to hire a lawyer, even though the accused may be a member of an unpopular or hated group, or may be charged with an offense which is peculiarly abhorrent.

The admitted circumstances here cannot support a holding that petitioner intelligently and understandingly waived her right to counsel. She was entitled to counsel other than that given her by Government agents. She is still entitled to that counsel before her life or her liberty can be taken from her.

What has been said represents the views of MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, MR. JUSTICE MURPHY, and MR. JUSTICE RUTLEDGE. They would therefore reverse the judgment of the Circuit Court of Appeals, set aside the prior judgment of the District Court and direct that court to grant the petitioner's prayer for release from further imprisonment under the judgment based on her plea of guilty. MR. JUSTICE FRANKFURTER and MR. JUSTICE JACKSON, for the reasons stated in a separate opinion, agree that the judgment of the Circuit Court of Appeals

⁹ American Bar Association, Canons of Professional and Judicial Ethics, Canon 15: "The lawyer owes 'entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability,' to the end that nothing be taken or withheld from him, save by the rules of law, legally applied. No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty. In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense."

Canon 4: "A lawyer assigned as counsel for an indigent prisoner ought not to ask to be excused for any trivial reason, and should always exert his best efforts in his behalf."

should be reversed, and that the District Court's prior judgment should be set aside, but they are of the opinion that, after setting aside its judgment, the District Court should further consider and make explicit findings on, the questions of fact discussed in the separate opinion.

The judgment of the Circuit Court of Appeals is reversed and that of the District Court is set aside. The cause is remanded to the District Court so that it may hold further hearings and give consideration to, and make explicit findings on, the questions of fact discussed in the separate opinion. If upon such further hearings and consideration the District Court finds that the petitioner did not competently, intelligently, and with full understanding of the implications, waive her constitutional right to counsel, an order should be entered directing that she be released from further custody under the judgment based on her plea.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 73.—OCTOBER TERM, 1947.

Marianna von Moltke, Petitioner,
v.

A. Blake Gillies, Superintendent of
the Detroit House of Correction.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[January 19, 1948.]

Separate opinion of MR. JUSTICE FRANKFURTER, in which MR. JUSTICE JACKSON joins.

The appropriate disposition of this case turns for me on the truth of petitioner's allegation that she was advised by an F. B. I. agent, active in the case, that one who merely associated, however innocently, with persons who were parties to a criminal conspiracy was equally guilty.

We are dealing, no doubt, with a person of intellectual acuteness. But it would be very rare, indeed, even for an extremely intelligent layman to have the understanding necessary to decide what course was best calculated to serve her interests when charged with participation in a conspiracy. The too easy abuses to which a charge of conspiracy may be put have occasioned, weighty animadversion by the Conference of Senior Circuit Judges. Report of the Attorney General, 1925, pp. 5-6; and see also the observations of Judge Learned Hand in *United States v. Falcone*, 109 F. 2d 579, 581; affirmed in 311 U. S. 205. The subtleties of refined distinctions to which a charge of conspiracy may give rise are reflected in this Court's decisions. See, e. g., *Kotteakos v. United States*, 328 U. S. 750. Because of its complexity, the law of criminal conspiracy, as it has unfolded, is more difficult of comprehension by the laity than that which defines other types of crimes. Thus, as may have been true of peti-

tioner, an accused might be found in the net of a conspiracy by reason of the relation of her acts to acts of others, the significance of which she may not have appreciated, and which may result from the application of criteria more delicate than those which determine guilt as to the usual substantive offenses. Accordingly, if an F. B. I. agent, acting as a member of the prosecution, gave her, however honestly, clearly erroneous legal advice¹ which might well have induced her to believe that she was guilty under the law as expounded to her by one who for her represented the Government, a person in the petitioner's situation might well have thought a defense futile and the mercy of the court her best hope. Such might have been her conclusion, however innocent she may have deemed herself to be. I could not regard a plea of guilty made under such circumstances, made without either the advice of counsel exclusively representing her or after a searching inquiry by the court into the understanding that lay behind it, as having been made on the necessary basis of informed self-determined choice.

Of course an accused "in the exercise of a free and intelligent choice, and with the considered approval of the court . . . may . . . competently and intelligently waive" his right to the assistance of counsel guaranteed by the Sixth Amendment. *Adams v. United States ex rel. McCann*, 317 U. S. 269, 275; and see *Patton v. United States*, 281 U. S. 276, and *Johnson v. Zerbst*, 304 U. S.

¹ This is the precise testimony: "That if there is a group of people in a 'Rum' plan who violate the law, and another person is there and the person doesn't know the people who are planning the violation and doesn't know what is going on, but still it seemed after two years this plan is carried out, in the law the man who was present becomes . . . the person nevertheless is guilty of conspiracy." The law, of course, is precisely to the contrary. *United States v. Falcone*, 311 U. S. 205, 210.

458. There must be both the capacity to make an understanding choice and an absence of subverting factors so that the choice is clearly free and responsible. If the choice is beclouded, whether by duress or by misleading advice, however honestly offered by a member of the prosecution, a plea of guilty accepted without more than what this record discloses can hardly be called a refusal to put the inner feeling of innocence to the fair test of the law with intelligent awareness of consequences. Therefore, if the F. B. I. agent had admitted that the petitioner accurately stated his advice to her, or if the District Court upon a conflict of testimony had found that memory or truth lay with the petitioner, I could not escape the conclusion that the circumstances under which the petitioner's plea of guilty was accepted did not measure up to the safeguards heretofore enunciated by this Court for accepting a plea of guilty, especially where a sentence of death was at hazard.

On the record as we have it, however, I cannot tell whether the advice which, if given, would have colored the plea of guilty, was actually given. If the unrevealing words of the cold record spoke to me with the clarity which they convey to four of my brethren, I should agree that the petitioner must be discharged. Conversely, if the District Court's opinion conveyed to me the findings which it radiates to my other brethren, I too would conclude that the judgment should be affirmed.

Unfortunately, the record does not give me a firm basis for judgment regarding the crucial issue of the F. B. I. agent's advice to the petitioner. It is not disputed that the agent, who was also a lawyer, did talk with her and did discuss legal issues with her. But he neither admitted nor denied whether, in the course of his discussions with her, he expounded the law so as hardly to leave her escape, however innocent under a correct view of the law she may have been. He did not even suggest

that even though he did not remember, he was confident that he could not have given her the kind of misleading legal information she attributed to him. On the contrary, he added that "it is quite possible that Mrs. von Moltke's memory is better than mine."² From the dead page, in connection with the rest of the agent's testimony, this suggests a scrupulous witness. But I cannot now recreate his tone of voice or the gloss that personality puts upon speech. Therefore I am unable to determine whether the petitioner pleaded guilty in reliance on the palpably erroneous advice of an F. B. I. lawyer-agent who, as the symbol of the prosecution, owed it to an accused in petitioner's position to give her accurate guidance, if he gave any.

Nor does the District Judge's opinion resolve these difficulties for me. From what he wrote it would be the most tenuous guessing whether he rejected the petitioner's account of the F. B. I. agent's counselling or whether he did not attach to that issue the legal significance which I deem controlling. Since the record affords neither re-

ital.
² "Q. And did you [the F. B. I. agent] during that discussion use a [sic] illustration about a rum runner?"

"A. Well, I heard Mrs. von Moltke say that, and since she did I have been trying to recall, and I cannot remember such an illustration.

"Q. I see.

"A. But it is quite possible that Mrs. von Moltke's memory is better than mine, and I may have used such an illustration."

ital.
 [in] ³ The District Judge indicated abandonment of the charges that the "agents of the Federal Bureau of Investigation mislead [sic] her, or made promises to her that, which at least some degree, influenced her action in pleading guilty to the charge," but "for the purpose of the record" he stated "most vigorously that there was absolutely nothing in the testimony sustaining such charges or implications." While it does appear, from the record, that petitioner abandoned her charge of coercion, there is nothing to buttress the suggestion that she abandoned the charge that she had been misled by the agent, and I therefore read the statement as referring to

solving evidence nor the District Court's finding on what I deem to be the circumstance of controlling importance, I would send the cause back to the District Court for further proceedings with a view to a specific finding of fact regarding the conversation between petitioner and the F. B. I. agent, with as close a recreation of the incident as is now possible.

threats or promises to induce confession by the petitioner. The District Judge gave no intimation whatever that in his view the plea of guilty in connection with all the other circumstances could not be deemed to have been intelligently tendered, if in fact it was influenced by the F. B. I. agent's exposition of the law, as asserted by the petitioner. Nowhere is there a suggestion that although the agent was not prepared to say her memory of the interview was false or incorrect, the District Judge rejected her account.

SUPREME COURT OF THE UNITED STATES

No. 73.—OCTOBER TERM, 1947.

Marianna von Moltke, Petitioner,

v.

A. Blake Gillies, Superintendent of
the Detroit House of Correction.

On Writ of Certio-
rari to the United
States Circuit
Court of Appeals
for the Sixth Cir-
cuit.

[January 19, 1948.]

MR. JUSTICE BURTON, with whom THE CHIEF JUSTICE
and MR. JUSTICE REED concur, dissenting.

As the issues in this case are factual and deal largely
with the credibility of witnesses, the binding force of
this decision as a precedent is narrow. However, to guard
against undue extension of its influence, a recorded dis-
sent seems justified.

The Government does not contest the release of the
petitioner if she establishes, as a matter of fact, that
either her long considered and unequivocal plea of guilty
in the original proceedings against her for violation of the
Espionage Act or her written and otherwise clearly stated
waiver of counsel in those proceedings was not freely, in-
telligently and knowingly made. The Government vig-
orously contends that she has failed in this proceeding
to establish either of those facts. We agree with the
Government. She has failed to do so and, having so
failed, she is not entitled to release. The printed record
does not require reversal of the judgment. The uniform
findings of fact against her by the three trial judges who
separately saw and heard her are amply sustainable.

The petitioner made her plea of guilty and filed her
waiver of counsel in open court before District Judge
Arthur F. Lederle on October 7, 1943. In November,

1944, after consideration and denial of her motion for leave to withdraw her plea of guilty, she was sentenced by District Judge Edward J. Moinet. She has made no direct attack on the judgment against her. Accordingly, before considering the exceptional burden of proof which she must bear in making a collateral attack upon that judgment more than a year after it was entered, it is well to examine the process of law which led up to this judgment.

At her arraignment, September 21, 1943, before District Judge Edward J. Moinet, she was assigned counsel to assist her during the arraignment. Such counsel advised her to stand mute. She did so. This conduct preserved her full rights and it has not prejudiced her position. A plea of not guilty was entered for her. This left her free to stand by it or to change it to a plea of guilty as she later did. There is no indication that other counsel could have done more for her than was done. She thus was made aware that the court would assign counsel to assist her. In fact she testified that, after the arraignment, "Judge Moinet said he would appoint an attorney right away, and I understood that the gentleman was to be expected to come right away." This referred to the period after her arraignment.

In addition to this contact with the attitude of the court on the subject of counsel, she frequently discussed the subject of counsel with her husband. He himself had some legal education. She also talked with two lawyer friends of her husband who came to see her as friends, although not professionally. She likewise discussed her situation on many occasions with the representatives of the Federal Bureau of Investigation and occasionally with representatives of the United States Attorney. She repeatedly was urged by her husband not to do anything until she had consulted with an attorney. On the basis of this advice, she decided not to plead guilty on Septem-

ber 28, although several other defendants in the same proceeding had done so. She testified as follows about her husband's advice and about her decision of September 28:

"Q. He told you to get a lawyer?

"A. Yes; he said I should not [plead guilty] before I have seen an attorney; on such a question I should talk to an attorney first about the whole thing.

"A. My husband said to wait until a lawyer comes out.

"Q. And you decided not to plead guilty because of that?

"A. Because of that, yes."

Several days later she finally determined to plead guilty. On October 7, 1943, she expressly waived counsel, both in open court and in writing. As to this she later was asked on the stand:

"Q. So, during the week you decided to disregard the advice that your husband had given you?

"A. Yes, sir.

"Q. You made that decision; yes or no?

"A. Yes."

In other words, she had discussed her situation to her own satisfaction to the point where she had reached a conclusion both as to her plea of guilty and as to her wish to waive counsel. There is no constitutional provision that required or permitted counsel to be thrust upon her against her wishes. She had a right to decide that she did not want to discuss her case further with anyone. The issue was not then and is not now whether she might have been benefited by having counsel. She was an "intelligent, mentally acute woman" and, for reasons of

her own, she made up her mind that she wished to plead guilty and to waive counsel. If she did this freely, intelligently and knowingly, that was her right and that action should be final, subject only to a motion to withdraw her plea in regular course by due process of law or to appeal from the judgment rendered on her plea. Under the rules of the court, any withdrawal of her plea had to be made within ten days after entry of such plea and before sentence was imposed. Rules for Criminal Appeals, Rule II (4), 292 U. S. 662. This was not done. Judge Lederle, to guard against any misunderstanding, on October 7, 1943, specially inquired if she desired the assistance of counsel. She answered in the negative. He then inquired as to what her plea was. She answered guilty. In addition she submitted a written waiver of counsel. The court then deferred sentence and referred the case to the United States Probation Officer for investigation and report. Ample time was taken for this.

In June, 1944, she was taken before Judge Moinet, before whom she originally had been arraigned. She then advised him that she wished to change her plea. The judge informed her that she was entitled to representation by counsel and that an attorney ought to make a motion for permission to withdraw her plea and that, if she had a preference as to counsel, he would appoint such counsel as she desired him to appoint. The matter was left in abeyance while she tried to select counsel. On July 3, 1944, she wrote to Judge Moinet, advising him that she had no preference and the court soon thereafter appointed counsel for the purpose of making her motion. The assistance rendered by such counsel is not criticized. He secured from Judge Moinet not merely a ruling upon the procedural point as to the untimeliness of her motion, but also specific findings bearing upon its merits. This order made by Judge Moinet, about a

year after her arraignment before him, is significant because of its direct relation to the issue now before the Court. His order read as follows:

"This cause having come on for hearing upon the motion of the defendant Grafyn Marianna von Moltke for leave to withdraw her plea of guilty, heretofore entered, and for leave to enter a plea of Not Guilty to the indictment filed herein, the matter after hearing, having been submitted, the Court, after consideration of said motion and of the arguments presented on behalf of the respective parties hereto, specifically finds:

"1. That the defendant Grafyn Marianna von Moltke was properly advised of her constitutional rights by the Court, both prior to and at the time she entered her plea of Guilty to the indictment;

"2. That the plea of Guilty, entered several weeks after the filing of the indictment and her arraignment thereon, was submitted after due and careful deliberation;

"3. That the defendant was advised of and thoroughly understood the nature of the charge contained in the indictment filed in this cause;

"4. That no promises or inducements or threats were made for the purpose of obtaining the plea of Guilty, and that the entry of the plea of Guilty was not due to any misrepresentations;

"5. That the motion praying for leave to withdraw the plea of Guilty was not filed within the period fixed by Rule II (4) adopted by the Supreme Court of the United States of America;

"Wherefore, It is Ordered that the said motion to withdraw the plea of guilty entered by the defendant Grafyn [Grafyn] Marianna von Moltke in the above entitled cause, be and the same is hereby denied."

This was in November, 1944. Judge Moinet asked the defendant whether she had anything to say why judgment should not be pronounced against her, and, no sufficient reason to the contrary being shown or appearing to the judge, he sentenced her to imprisonment for four years. She began serving her sentence. However, after a determination had been made by the Government in 1945, looking toward her removal and repatriation to Germany, she, in 1946, filed a petition for *habeas corpus* making the present collateral attack on the original proceedings. We, therefore, are asked to review here the factual findings of the District Court made in April, 1946, through District Judge Ernest A. O'Brien in this *habeas corpus* proceeding and, by way of collateral attack, to review the action of the same District Court, taken in the original proceeding through Judge Lederle in October, 1943, and through Judge Moinet in November, 1944. While such proceedings by *habeas corpus*, based on constitutional grounds, are vital to the preservation of individual rights, the protection of our judicial process against the making, in this way, of unjustified attacks upon such process is equally important to the preservation of the rights of the people as a whole. Each attempted attack calls for the careful weighing not only of the claims made, but also of the proof submitted to sustain each claim.

In now attacking collaterally the unappealed and deliberate judicial proceedings of 1944, a heavy burden of proof rests upon the petitioner to establish the invalidity of her original plea and waiver. The essential presumption of regularity which attaches to judicial proceedings is not lightly to be rebutted. *Johnson v. Zerbst*, 304 U. S. 458, 468-469; *Hawk v. Olson*, 326 U. S. 271, 279. Judge O'Brien recognized the strength of this presumption and the heavy burden of proof to be borne by the petitioner. He therefore held extended hearings at which the petitioner and many others appeared as wit-

nesses. The evidence included a substantial showing that the trial judge in accepting the petitioner's plea of guilty in the original proceeding had done so only after satisfying himself, by careful questioning, that the plea was not the result of threats or promises and that, with knowledge of her right to counsel, the petitioner had voluntarily waived that right.¹ At the conclusion of these hearings Judge O'Brien found not only that the petitioner had failed to sustain the burden resting upon her, but that the overwhelming weight of the evidence in these proceedings was against her.

His statement as the trial judge in the *habeas corpus* proceedings is impressive and entitled to great weight here:

"In the petition filed in this cause the petitioner directly or by implication charges that the District Attorney having the case in charge and agents of the Federal Bureau of Investigation mislead [misled] her or made promises to her that, which at least [in] some degree, influenced her action in pleading guilty to the charge. I am of the opinion that these charges have now been abandoned by the petitioner but for the purpose of the record I wish to state most vigorously that there was absolutely nothing in the testimony sustaining such charges or implications. The conduct of both the officials of the District Attorney's office and the agents of the Federal Bureau of Investigation were meticulous in safeguarding the rights of the petitioner and that the record is utterly bare of any support of petitioner's contentions.

"The petitioner is a woman obviously of good education and above the average in intelligence. Her knowledge of English was fluent and ample. She had

¹ See *Adams v. United States ex rel. McCann*, 317 U. S. 269, 276-277.

discussed the case with various people before the plea of guilty was entered. In fact, at her own request, she had a conference with the chief assistant district attorney wherein she endeavored to secure from him some promises of leniency and convenience as an inducement to a plea of guilty. These advancements by the petitioner were, of course, repudiated by the district attorney and she was informed of the officials who had jurisdiction over the matter in advent [the event] of her plea of guilty.

"The chief contention of the petitioner was that her waiver of her right to counsel was not competently and intelligently made. The plea was taken before Judge Arthur Lederle of this District. The evidence showed that the Judge inquired of her if she understood the charges made in the indictment. She answered in the affirmative. The Judge inquired if she desired the assistance of counsel. She answered in the negative. The Judge then inquired what was her plea. She answered guilty. In addition to this she submitted a signed waiver stating that she did not desire counsel.

"The only substantial question in this case is whether the petitioner intelligently and knowingly waived her constitutional rights. It was her obligation to sustain the allegations of her petition by a preponderance of evidence. Not only has she failed in this but I believe that the evidence is overwhelming against her contentions. The petitioner is an intelligent, mentally acute woman. She understood the charge and the proceedings. She freely, intelligently and knowingly waived her constitutional rights. I conclude, therefore, that there is no merit in her petition and that it shall be dismissed together with the writ."

The Circuit Court of Appeals affirmed the judgment dismissing the petition for the writ of *habeas corpus*. That judgment is now brought here and we are called upon to make a further review of the factual conclusions of the District Court in the *habeas corpus* proceedings.

Due process of law calls for an equal regard by us for the interests of the Government and of the petitioner in seeking the nearest possible approximation to the truth. Necessarily we have only the printed record here. On the other hand, the trial judge, faced by the same issues, heard spoken the words we now read. He saw the original instruments that we now see reproduced. He observed the conduct and expressions of the petitioner and of the other witnesses whereas we cannot make an informed independent conjecture as to such conduct or expressions. From the living record he found the factual issues overwhelmingly against the petitioner.

There is nothing in the printed record sufficient to convince us that, if we had seen the witnesses and heard the testimony, we would not have reached the same conclusion. Much less is there anything in it that convinces us that, not having seen or heard it made, we are justified in reversing his findings which were based upon more than can be before us. Under the circumstances, we believe that the truth is more nearly approximated and justice is more surely served by reading the printed record in the strong light of the trial judge's factual conclusions than by attempting to interpret that record without giving large effect to his conclusions as to its credibility and to the inferences he has drawn from it. The aid to the ascertainment of the truth to be derived from the trial court's impartial observation of the witnesses should not be dissipated in the process of review. His appraisal of the living record is entitled to proportionately more, rather than less, reliance the further the reviewing court is removed from the scene of the trial. See *District of Co-*

Columbia v. Pace, 320 U. S. 698, 701; *United States v. Johnson*, 319 U. S. 503, 518; *Williams Mfg. Co. v. United Shoe Machinery Corp.*, 316 U. S. 364, 367; *Delaney v. United States*, 263 U. S. 586, 589-590.

Her status as an enemy alien does not, in itself, affect her right to counsel or the informed character of her plea of guilty and her waiver of counsel. The fact that the charge against her was under the Espionage Act and therefore carried a technical possibility of the death penalty did not at any time introduce a practical consideration that she was in actual danger of suffering capital punishment. She accurately forecast the general character of her sentence and was concerned primarily with the wish that her sentence be served near her family. An assistant district attorney stated that he would write a letter recommending that she be imprisoned close to her family.

While a conspiracy is exceptionally difficult to define in all its legal and factual complexities, there is nothing in the Constitution that prevents an accused from freely, intelligently and knowingly choosing to plead guilty to that, as well as to other complex charges, for reasons best known to the accused, as an alternative to standing trial on that charge. This was her right. Having thus positively decided not to stand trial she did not require counsel in order freely, intelligently and knowingly to waive counsel.

Our Constitution, Bill of Rights and fundamental principles of government call for careful and sympathetic observance of the due process of law that is guaranteed to all accused persons, including enemy aliens like the petitioner. The Constitution, however, was adopted also in order to establish justice, insure domestic tranquility, promote the general welfare and secure the blessings of liberty to the people of the United States as a whole. To that end, it is equally important to review with sympathetic understanding the judicial process as constitution-

ally administered by our courts. While the majority of this Court are not ready to affirm the judgment below on the record as it stands, their decision to remand the case for further findings does not mean that established and salutary general presumptions in favor of the validity of judicial proceedings and in favor of a trial court's conclusions as to the credibility of witnesses are to be relaxed.